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80-868
No.

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1980

CATHERINE M. BURWELL, ET AL.
*Petitioners,*

v.

EASTERN AIR LINES, INC.
*Respondent.*

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

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## QUESTIONS PRESENTED

1. Whether plaintiffs in an employment discrimination case, who have demonstrated a prima facie case of discriminatory impact and rebutted an employer's business necessity defense by demonstrating the existence of equally safe and non-discriminatory alternative policies, must also prove that the employer failed to act reasonably when initially adopting the discriminatory policy?

2. Whether the Court of Appeals may substitute the reasonableness standard from Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978), a discriminatory treatment case, for the business necessity standard of Moody v. Albemarle Paper Co., 422 U.S. 405 (1975), applicable in discriminatory impact cases?

3. Whether Rule 52 of the Federal Rules of Civil Procedure permits an Appellate Court to ignore findings of fact critical to the District Court's holding without finding them to be clearly erroneous?

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding in the United States Court of Appeals for the Fourth Circuit were Catherine M. Burwell, Jean H. Proctor, and Sharyn D. Clayton (appellee-plaintiffs)[1/] and Eastern Air Lines, Inc. (appellant-defendant).

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1/ The District Court certified a class on October 9, 1975, under Fed. R. Civ. P. 23(b)(1) and (2), which was defined as "all female flight attendants employed by Eastern . . . at any time since October 27, 1972, or who may be so employed in the future, who are, were, or may in the future be subject to Eastern's maternity leave policy."

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| PARTIES TO THE PROCEEDING BELOW | ii |
| TABLE OF CONTENTS | iii |
| TABLE OF AUTHORITIES | vi |
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| STATUTES AND REGULATIONS INVOLVED | 2 |
| STATEMENT OF THE CASE | |
| A. Background | 3 |
| B. The District Court Decision | 6 |
| 1. Evolution of the Policy | 8 |
| 2. Policies Concerning the Physical Condition of Flight Attendants | 10 |
| 3. The Medical Evidence | 12 |
| C. The Court of Appeals Decision | 19 |

Table of Contents, Continued

Page

REASONS FOR GRANTING THE WRIT . . . 21

I. The Decision Below is in Direct Conflict with Applicable Decisions of This Court and Four Courts of Appeals . . . . . 26

II. The Court of Appeals Misapplied the Burdens of Proof Under Discriminatory Impact and Discriminatory Treatment Cases . . 31

III. The Court of Appeals Ignored the Findings of Fact Critical to the District Court's Holding Without Finding Them to be Clearly Erroneous . . . . . 36

IV. The Court Should Decide This Issue to Resolve the Conflicting Holdings in the Lower Courts . . . . . 40

CONCLUSION . . . . . 44

APPENDIX

A. Opinion of the Court of Appeals . . . . 1a

Table of Contents, Continued


| | | Page |
|---|---|---|
| B. | Opinion and Order of the District Court . . . . . | 106a |
| C. | Statutes and Regulations Involved . . . . . | 250a |

TABLE OF AUTHORITIES

CASES — Page

Air Line Pilots Ass'n. v. Western Air Lines, Inc., 22 E.P.D. ¶ 30,636 (N.D.Cal. 1979), appeal pending . . . . . 43

Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963) . . . 40n

Bianchini v. Humble Pipe Line Co., 480 F.2d 251 (5th Cir. 1973) . . . . . 39

Condit v. United Air Lines, Inc., 12 E.P.D. ¶ 11,195 (E.D. Va. 1976), aff'd as not clearly erroneous, 558 F.2d 1176 (4th Cir. 1977), cert. denied, 435 U.S. 934 (1978) . . . . . 43

EEOC v. Delta Air Lines, Inc., 441 F. Supp. 626 (S.D.Tex. 1977), rev'd. and remanded, 619 F.2d 81 (5th Cir. 1980) . . . 42n

Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978) . . i, 22, 32, 33, 34n, 35

Green v. Missouri Pacific Railroad Co., 523 F.2d 1290 (8th Cir. 1975) . . . . . 22n

Page

Griggs v. Duke Power Co.
401 U.S. 424 (1971) . . . 21n, 22, 32

Harriss v. Pan American World Airways, Inc., 437 F. Supp. 413 (N.D.Cal. 1977), appeal pending . . . . . 23, 42

In re National Airlines, Inc., 434 F. Supp. 249 (S.D. Fla. 1977) . . . . . 23, 41

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) . . . . . 34

Maclennan v. American Airlines Inc., 440 F. Supp. 466 (E.D. Va. 1977) . . . . . 20, 20n, 41

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) . . . . . 32, 33

Moody v. Albemarle Paper Co., 422 U.S. 405 (1975) . . . i, 21n, 22, 29, 30, 32, 33

Nashville Gas Co. v. Satty, 434 U.S. 136 (1977) . . . . . 7n, 26, 32

Palmer v. General Mills, Inc., 513 F.2d 1040 (6th Cir. 1975) . . 22n

Page

Parson v. Kaiser Aluminum & Chemical Corp., 575 F.2d 1274, (5th Cir. 1978), cert. denied, 441 U.S. 210 (1979) . . . . . 21n

Robinson v. Lorillard, 444 F.2d 791 (4th Cir.), cert. dismissed, 404 U.S. 1006 (1971) . . . 17, 29, 35

Solo Cup v. Federal Ins. Co., 619 F.2d 1178 (7th Cir. 1980) . . . . . 33

United Air Lines, Inc. v. State Human Rights Appeal Board, 61 App. Div. 2d 1010 (2d Dept.), appeal denied, 44 N.Y. 2d 648, cert. denied, 439 U.S. 982 (1978) . . . . . 42n

United States v. Bethelem Steel Corp., 446 F.2d 652 (2d Cir. 1971) . . . . . 21n, 31

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969) . . . . . 23, 38, 40

STATUTES

Title VII of the Civil Rights Act of 1964, 78 Stat. 255, as amended, 42 U.S.C. § 2000e, et seq. . . . . Passim

OTHER AUTHORITIES

29 C.F.R. § 1604.2(a)(1)(1979). . . . 3

Fed. R. Civ. P. 52(a) . . . . . ii, 37

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EASTERN AIR LINES, INC.

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in this proceeding.

## OPINIONS BELOW

The per curiam, dissenting, and concurring opinions of the Court of Appeals (en banc) are not yet officially

reported but are unofficially reported at 23 F.E.P. Cases 949 and appear in Appendix A hereto (pp. 1a-105a, infra).

The Memorandum Opinion and Order of the United States District Court for the Eastern District of Virginia (by Judge Robert H. Merhige) is reported at 458 F. Supp. 474 and appears in Appendix B hereto (pp. 106a-249a, infra).

## JURISDICTION

The judgment of the Court of Appeals was entered on August 29, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTES AND REGULATIONS INVOLVED

Sections 703(a) and (e)(1) of Title VII of the Civil Rights Act of 1964, 78 Stat. 255, as amended by the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. §§ 2000e-2(a) and (e)(1) (1970 and Supp. V. 1975), and Section 1604.2(a)(1) of the Equal Em-

ployment Opportunity Commission Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.2(a)(1)(1979), appear in Appendix C hereto (pp. 250a-252a, infra.).

## STATEMENT OF THE CASE

### A. Background

Petitioners, flight attendants employed by Eastern Air Lines, Inc. ("Eastern"), brought this action against Eastern pursuant to § 703(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(a).[2/] Petitioners sought declaratory, injunctive, and monetary relief to redress the

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2/ Petitioners Burwell and Proctor brought their action in the United States District Court for the Eastern District of Virginia. A suit brought subsequently by petitioner Clayton in the Northern District of Alabama, challenging the same policies, was transferred to the Eastern District and the actions consolidated. A class, described in p. ii n.1, supra, was certified on October 9, 1975.

discriminatory effects of certain aspects of Eastern's maternity leave policies. Petitioners alleged that Eastern violated § 703 (a) of Title VII by requiring, inter alia, an immediate leave of absence, without pay, upon a flight attendant's knowledge of her pregnancy.

The District Court found that petitioners proved a prima facie case of discrimination by showing that Eastern's mandatory maternity leave policy had a discriminatory effect on women. The Court also found that Eastern's justification for the policy (its concern for the safety of the flight attendant and the passengers) was unsupported by the medical evidence, expert testimony, Eastern's lackadaisical attitude toward the physical condition of its employees, and the existence of a less discriminatory policy approved by the Mayo Clinic and successfully used by Northwest Airlines

since 1973. The District Court held that Eastern had failed to justify its discriminatory policy as either a bona fide occupational qualification or by business necessity. The Court also found that petitioners had established a less discriminatory and equally safe alternative and had demonstrated that Eastern's professed safety defense was merely a pretext for invidious discrimination.

The District Court enjoined Eastern from requiring, inter alia, a forced maternity leave prior to the twenty-eighth week of gestation, unless it could be shown that an individual flight attendant was unable to perform her duties. Eastern appealed to the United States Court of Appeals for the Fourth Circuit which, sitting en banc: (a) affirmed by a vote of 6 to 3 the District Court's enjoining of Eastern's forced maternity leave policy for the first

thirteen weeks of pregnancy and (b) reversed, by a vote of 5 to 4 the District Court's holding that Eastern must evaluate on an individual basis the ability of each flight attendant to perform her duties between the thirteenth and twenty-eighth week of her pregnancy. This petition for certiorari is confined to the Court of Appeals' holding with respect to (b) above.

B. The District Court Decision

The District Court found that pregnancy was the only health-related condition that automatically disqualifies Eastern's flight attendants from work App. B at 139a. In all other instances, the decision as to whether a flight attendant was in sufficiently good health to perform his or her duties was left to the good judgment of each flight attendant; and individuals with non-pregnancy related health problems

were evaluated individually. Id. at 140a-41a. The Court concluded that (1) since pregnancy was confined to women, it followed that only women were automatically and involuntarily precluded from work due to a physical condition; and (2) that Eastern's mandatory maternity leave policy "imposed on women a substantial burden that men need not suffer."[3/] The Court held that a prima facie case of sex discrimination, and thus a violation of Title VII, had been established but that Eastern could attempt to justify its policy under either the § 703(e) bona fide occupational qualification standard or the "business necessity standard." Id. at 197a-98a.

Eastern attempted to justify the policy under both standards by asserting

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3/ Nashville Gas Co. v. Satty, 434 U.S. 136, 142 (1977). App. B at 197a.

that it was necessary: (1) to protect the health and welfare of pregnant flight attendants and their unborn chiildren and (2) for passenger safety. Id. at 20la. The Court's ultimate assessment of Eastern's defenses was premised on voluminous factual findings adduced from the evidence presented at trial, which are summarized below:[4/]

1. Evolution of the Policy

The District Court and the Appellate Court agreed that Eastern's maternity leave policy evolved from a history of sex discrimination.[5/] App. A at 49a;

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4/ Since both the District Court and Court of Appeals agreed that respondent's policy could not be justified on the basis of concern for the health of the flight attendant and child, the summary excludes the findings relevant to that issue.

5/ Until the mid-1960's, only Eastern's female flight attendants were fired if they married. Eastern also refused to hire married flight attendants until 1973, a policy which had an impact on women primarily since Eastern hired only

Footnote continued on following page.

App. B at 219a. The policy itself developed over time, from automatic termination without reinstatement rights (1931-1965), to the policy of mandatory leave without pay upon knowledge of pregnancy (March 21, 1970).[6/] App. B at 114a-15a. Maternity leave was the only mandatory leave without pay and pregnancy the only physical condition which automatically precluded Eastern flight attendants from flying.[7/] Id. at 139a. Al-

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Footnote 5 continued from previous page--

women as flight attendants from the late 1950's until the early 1970's. App. B at 114a.

6/ On April 12, 1974 in connection with the settlement of Healen v. Eastern Air Lines, Inc., Civil Action No. 1897 (N.D. Ga.), Eastern agreed to restore seniority to any female flight attendant whose seniority had been adversely affected as a result of maternity leave occurring prior to July 1, 1972. App. B at 115a-16a.

7/ As indicated above, the decision as to whether a flight attendant was in

Footnote continued on following page.

though aware that other airlines (Northwest and Air Canada) operated safely with less restrictive policies, Eastern never evaluated the feasibility of administering the policy on an individual basis and, prior to its preparation for trial, never sought or received any professional or expert opinions concerning the ability of a pregnant flight attendant to continue to perform her duties. Id. at 139a-40a, 210a-11a.

2. Policies Concerning the Physical Condition of Flight Attendants

The Court found that Eastern's general practices concerning the physical condition of its flight attendants con-

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Footnote 7 continued from previous page--

sufficiently good health to fly was left to the good sense of the individual flight attendant, with pregnancy being the sole exception. The testimony at trial indicated that the large majority of Eastern's flight attendants removed themselves from flight status if they felt physically unable to perform. App. B at 140a-41a.

trasted sharply with its pregnancy policy. Except for that policy, Eastern had no written guidelines as to when a flight attendant should not fly because of physical difficulty. There were no periodic physical examinations and no procedures for determining whether a flight attendant was in sufficiently good health to work a particular flight.[8/] Id. at 140a.

The Court also found that Eastern made virtually no effort to police its maternity leave policy. Voluntary reporting and visual detection were the only methods relied on for enforcement. Eastern never disciplined a flight attendant who continued to fly after knowledge

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8/ Effective December 4, 1975, flight attendants with diabetes controlled by insulin, and certain epileptic flight attendants, have been permitted to fly despite evidence that such flight atten-

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of pregnancy although it was common knowledge that most Eastern flight attendants continued to work through at least the first trimester and many, including petitioners, continued flying through the fifth month. Id. at 140a, 142a-43a.

3. The Medical Evidence

The medical experts agreed that pregnancy, in the vast majority of instances, was an entirely healthy condition which became disabling only near the commencement of labor. Id. at 144a.

The common side-effects of pregnancy (morning sickness, fatigue, and fainting) are associated primarily with the very early or late stages of pregnancy. Id. at 166a.

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Footnote 8 continued from previous page--

dants are more likely to be rendered unable to perform their duties than pregnant flight attendants. App. B at 139a.

Eastern's own Medical Director (in a letter to Eastern's General Counsel) expressed agreement with American Airlines' plan to permit flight attendants to work during the first trimester "since the reasons for denial for medical and/or safety considerations during this period . . . are rather weak if at all present." Id. at 162a n.3.

The experts agreed that miscarriages were preceded by obvious symptoms and that a flight attendant with no symptoms prior to boarding a six-eight hour flight had little chance of miscarrying prior to completing it. Id. at 157a, 211-12a. Moreover, 90 percent of all miscarriages occur during the first twelve weeks, a period during which Eastern's pregnant flight attendants had been flying routinely.[9/] Id. at

9/ The record reflected no instance
Footnote continued on following page.

157a, 210a.

Petitioners' experts testified that flight attendants experiencing normal pregnancies could perform normal and emergency duties without difficulty through the twentieth week, with the limiting factor being increased girth and abdominal expansion (resulting in limited agility). Id. at 164a-65a. Prior to the twentieth week such changes are insignificant; after the twentieth week, the rate of growth varies among individuals but is both observable and measurable. Id. at 151a, 216a.

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Footnote 9 continued from previous page--

where a flight attendant miscarried during a flight or was rendered unable to perform her duties during a flight by the symptoms of miscarriage. App. B at 210a. Three Eastern flight attendants did remove themselves from duty either before or after the conclusion of a flight because they were experiencing miscarriage symptoms.

The opinions of petitioners' experts were confirmed by the Obstetrics and Gynecology Department of the Mayo Clinic and implemented by the Medical Director of Northwest Airlines who was also Director of Preventive Medicine of the Mayo Clinic. It was the Mayo Clinic's consensus that during the first trimester (and for several weeks beyond) a flight attendant could perform all her duties without difficulty; and that during the second trimester a flight attendant's ability to perform varied among individuals. Id. at 167a. The consensus formed the basis for the maternity policy adopted by Northwest which permits a pregnant flight attendant to work as long as she is fit and able up to the twenty-eighth week but which requires her, during the fifth month and each month thereafter, to submit a doctor's statement certifying

that she is able to perform her assigned duties. Id. at 167a. Northwest has experienced no operational problems related to pregnancy whatsoever since adopting the policy in 1973. App. B at 167a-68a, 210-211a. As such, the Court found that the Northwest experience served as empirical verification of the position of the petitioners' experts and of the existence of a viable, less restrictive policy alternative. Id. at 168a, 208a-09a. The Court also found that the Federal Aviation Administration ("FAA"), which promulgates extensive safety regulations applicable to commercial airlines, did not require mandatory maternity leave for pregnant flight attendants. Id. at 220-21a. The Court concluded that for the first twenty weeks, a pregnant flight attendant without complications could perform her duties as well as she could non-pregnant; that

between the twentieth and twenty-eighth week, when abdominal expansion occurred at individual (and identifiable) rates, the ability to work "is very much an individual matter"; and that as of the twenty-eighth week, "virtually all flight attendants should discontinue work." Id. at 213a-16a.

* * *

On the basis of these findings, and using the formulation of business necessity first set forth in Robinson v. Lorillard, 444 F.2d 791, 798 (4th Cir.), cert. dismissed, 404 U.S. 1006 (1971), the District Court found that Eastern's mandatory maternity leave policy was not justified by the business necessity exception to § 703(a) of Title VII. Id. at 200a-04a.

The District Court also considered Eastern's policy in light of the bona fide occupational qualification set forth

in § 703(e) of Title VII and found the facts inadequate to support that defense prior to the twenty-eighth week of pregnancy and on flights of less than six hours duration. Id. at 207a-09a, 213a n.14, 215. Moreover, against the background of Eastern's history of sex discrimination, failure to enforce the leave policy, lax approach to flight attendant physical fitness generally, a "medical defense . . . assembled after the commencement of litigation", and "the severity of the exclusion for pregnancy compared to sex-neutral physical infirmities", the Court found Eastern's safety rationale for the policy to be "a mere pretext for invidious discrimination against women". Id. at 221a-25a.

The Court enjoined respondent from enforcing the mandatory maternity leave policy found violative of Title VII and, until an appropriate new policy was put

into effect, ordered the parties to adhere to an interim policy devised by the Court.[10/]

The Court of Appeals Decision

Respondent's appeal of the District Court's rulings on both its mandatory maternity leave and ground transfer policies was heard initially by a three-member panel of the Fourth Circuit. Prior to the hearing, respondent amended the record by filing a copy of a new "interim" maternity leave policy which it had adopted effective April 20, 1979. Respondent's new policy permits pregnant flight attendants to continue flight duties

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10/ The District Court's interim policy provided that during the first thirteen weeks, flight duty should be entirely the choice of the flight attendant; from thirteen to twenty weeks, Eastern could require monthly written permission from her doctor; from twenty to twenty-eight weeks, flight duty could be conditioned on weekly permission from her doctor; and all flight attendants could be prohibited from flying after the twenty-eighth week. Id. at 239a-41a.

as long as their physicians certify their ability to work.[11] App. A at 70a. As such, it is less restrictive than the "interim policy" developed by the District Court, which had been stayed pending the appeal.

Following the hearing before the three-member panel, the case was re-set, sua sponte, for a hearing en banc with the appeal in Maclennan v. American Airlines, Inc., 440 F. Supp. 466 (E.D. Va. 1977).[12]

The Fourth Circuit reversed that portion of the District Court's ruling

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11/ In addition, pregnant flight attendants are afforded the sick leave and disability benefits made available under the new policy only if their physicians certify that they are unable to work. A pregnant flight attendant who removes herself from flight status before that time most go on unpaid leave. App. A at 70a-71a.

12/ The Maclennan case was settled prior to the hearing en banc and thus, only the instant case was heard.

which invalidated respondent's mandatory maternity leave policy between the twentieth and twenty-eighth week of pregnancy. App. A at 3a.

## REASONS FOR GRANTING THE WRIT

The judgment of the Court of Appeals is in direct conflict with the decisions of this Court, and the Second, Fifth, Sixth, and Eighth Circuits, in holding that an employer's policy which constituted a prima facie case of discriminatory impact was nevertheless justified as a business necessity even though petitioners demonstrated the existence of equally safe, less discriminatory alternatives. 13/

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13/ Griggs v. Duke Power Co., 401 U.S. 424, 431-32 (1971); Moody v. Albemarle Paper Co., 422 U.S. 405, 435 (1975); United States v. Bethlehem Steel Corp., 446 F.2d 652, 662 (2d Cir. 1971); Parson v. Kaiser Aluminum & Chemical Corp., 575 F.2d 1274, 1389 (5th Cir. 1978), cert. denied, 441 U.S.

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The Court also held that a plaintiff, in establishing that a policy constitutes a pretext for discrimination, must show it was a pretext when first adopted rather than at time of trial.

The judgment below misapplied the standards of proof applicable to a prima facie case of disparate impact. Griggs v. Duke Power Co., supra, and Moody v. Albemarle Paper Co., supra, by evaluating the lawfulness of respondent's policy on the basis of whether it met the standard of reasonableness applicable in a case of discriminatory treatment. Furnco Construction Co. v. Waters, supra.

The Court of Appeals misapplied

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210 (1979); Palmer v. General Mills, Inc., 513 F.2d 1040, 1043-44 (6th Cir. 1975); Green v. Missouri Pacific Railroad Co., 523 F.2d 1290, 1298 (8th Cir. 1975).

the clearly erroneous standard in overturning the District Court's finding that pregnant flight attendants who may have disabling problems can be identified ahead of time. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969). It erred also in ignoring findings of fact about alternative maternity leave policies which were central to the District Court's holding.

The lower courts considering mandatory maternity leave for flight attendants have reached contradictory results, therefore exposing the flight attendants to contradictory rules in different jurisdictions and on different airlines. Compare e.g. In re National Airlines, Inc., 434 F. Supp. 249 (S.D.Fla. 1977) and Harriss v. Pan American World Airways, Inc., 437 F. Supp. 413 (N.D.Cal. 1977) appeal pending.

The Court of Appeals has decided an extremely important question of federal law by substantially altering the burdens of proof in Title VII cases involving prima facie proof of discriminatory impact. While the facts of this case are limited to the lawfulness of respondent's forced maternity leave policy, a question that has not been decided by this Court, the reasoning of the judgment has a demonstrable effect on all Title VII. This Court, in its recent opinions, has discussed the applicable burdens in disparate treatment and impact cases and has alluded to plaintiffs' right to establish pretext but has not set forth the difference between establishing pretext in disparate treatment and impact cases. If the judgment of the Court of Appeals is allowed to stand, a decade and a half of carefully developed case law will be for naught. Irrespective of the

severity of the discrimination, employers will need only demonstrate that they acted reasonably at the time they instituted the challenged policy. Even if plaintiffs show the existence of equally safe and less discriminatory alternatives in the industry, the employer can avoid liability by the incantation that the Court's consideration of such alternatives constitutes judicial interference in the employer's business.

Finally, if the Court of Appeals correctly assumes that policies which deprive pregnant women of a right to earn their livelihood allows the employer to meet a lesser burden than in race or other sex discrimination cases, then this Court should resolve that question once and for all.

I. The Decision Below is in Direct Conflict with Applicable Decisions of this Court and Four Courts of Appeals

This Court and the Second, Fifth, Sixth, and Eighth Circuits have held that a policy which is demonstrably discriminatory in impact must (a) foster safety and efficiency, (b) be essential to that goal, and (c) there must be no acceptable alternative that will accomplish that goal equally well with a lesser differential impact.[14/] Both the District and Appellate Courts agreed that respondent's policy of not allowing pregnant flight attendants the opportunity to work at all during their pregnancy, while imposing no such restriction on any other physical condition, discriminated against women, Nashville Gas Co. v. Satty, 434 U.S. 136

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14/ See p. 21 n.13, supra.

(1977), and was unsupported as a business necessity during the first thirteen weeks of pregnancy. The Court of Appeals, however, found that for the period of pregnancy between the thirteenth and twenty-eighth week, the policy was necessary to assure passenger safety. The Court granted judgment to the employer on this issue even though it had met only (a) and (b) of the business necessity test set forth above. It did not consider petitioners' evidence that there was an alternative, non-discriminatory policy which can assure passenger safety equally well.

The District Court found that based on the advice of the Mayo Clinic staff, Northwest Airlines has, since 1973, successfully employed a policy permitting pregnant flight attendants to work through the second trimester. Northwest's pregnancy leave policy based on individual deter-

mination has worked without any difficulty whatsoever. App. B 167a-68a, 210a-11a.

In addition, Eastern's own new "interim" policy, which permits pregnant flight attendants to continue working as long as their own doctors or Eastern's Medical Department certify their capability, undercuts its safety-based business necessity defense and, like the similar Northwest policy, indicates that a workable, less discriminatory alternative based on individual evaluation is and was always available. The adoption of the new policy, which was also ignored in the Court of Appeals' majority opinion, "further supports the district court's conclusion that the mandatory ban of all pregnant stewardesses was not a business necessity." App. A at 70a-71a (Butzner J., dissenting).[15/] The Court of Appeals did

15/ This interim policy, adopted im-

Footnote continued on following page.

not even mention these less discriminatory alternatives and certainly did not find them clearly erroneous. As the dissenting opinion notes, "[t]he most comprehensive empirical evidence in the record about the routine operation of an airline that does not have a mandatory pregnancy leave policy fully sustains the district court." App. A at 61a.

By failing to consider the less discriminatory alternatives presented by the petitioners, the Court of Appeals omitted a critical element of the business necessity test as set forth in Moody v. Albemarle Paper Co., supra and Robinson v. Lorillard Corp., supra.[16/]

Footnote 15 continued from previous page--mediately after amendments to Title VII requiring the payment of sick leave and disability benefits to individuals on pregnancy leave became effective, underscores petitioners' contention at trial that Eastern's basis for continuing the forced leave policy was economics, not safety.

16/ See p. 26, supra.

The Court of Appeals' decision in this case is, therefore, directly and squarely in conflict with this Court's holding in Moody v. Albemarle Paper Co., supra, and the decisions of the Second, Fifth, Sixth, and Eighth Circuits.

The Court of Appeals also found that the adequacy of the business necessity defense depends on whether "at the time it designed the controverted policy . . . all information available to the employer reasonably require[d] [its adoption]," irrespective of "whether [the] underlying assumption is ultimately proved to be correct." (Emphasis supplied). App. A at 53a-54a. This time analysis may be appropriate in a disparate treatment case where there is no discrimination against a protected class and motive is an essential element, but it has no place in a disparate impact case.

The Fourth Circuit's determination that a discriminatory policy may be continued if it was reasonable when first adopted is in direct conflict with the Second Circuit's holding that "if the legitimate ends of safety and efficiency can be served by a reasonably available alternative system with less discriminatory effects, then the present policies may not be continued." United States v. Bethlehem Steel Corp., supra, 446 F.2d at 662.

## II. The Court of Appeals Misapplied the Burdens of Proof Under Discriminatory Impact and Discriminatory Treatment Cases

The Court of Appeals, in addition to omitting a critical element of the business necessity test, permitted Eastern to meet its burden of proof by showing that it acted reasonably in adopting its mandatory maternity leave policy. This lenient standard imposed by the Court of Appeals has been applied only in discriminatory

treatment cases where there is an absence of invidious discrimination against a protected class. Petitioners submit that the decisions of this Court establishing differing standards of proof in discriminatory impact and treatment cases demonstrate that a reasonableness standard has no place in a discriminatory impact case. Compare Griggs v. Duke Power Co., supra; Moody v. Albemarle Paper Co., supra; and Nashville Gas Co. v. Satty, supra with McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Furnco Construction Corp. v. Waters, supra.

In the discriminatory impact case there are two defenses available: business necessity and § 703(e) of the statute. In the discriminatory treatment case the defendant must only show that his actions are reasonable. In a discriminatory impact case the plaintiff may rebut a successful business necessity

defense if he can show that the defendant intended to discriminate against him. The plaintiff is also free to rebut the defense by showing that there is a less discriminatory alternative which would accomplish defendant's stated business purpose equally well, thereby demonstrating that defendant's stated reason for the policy was pretextual. Moody v. Albemarle Paper Co., supra.

In contrast, the plaintiff in a discriminatory treatment case may rebut defendant's reasonableness defense by either showing that it intended to discriminate against him or proving that the stated non-discriminatory reason was a sham. McDonnell Douglas Corp. v. Green, supra; Furnco Construction Corp. v. Waters, supra. "[P]roof of discriminatory motive is critical in a disparate treatment action." Solo Cup v. Federal Ins. Co., 619 F.2d 1178,

1186 (7th Cir. 1980); International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977).[17/]

The Court of Appeals incorrectly held that in a discriminatory impact case, all that defendants need demonstrate is a rational basis for the policy. The notion of rational basis is exclusively limited to cases of discriminatory treatment. As Judge Butzner noted in his dissent, when a prima facie case of discriminatory impact has been established, the incantation of "a rational justification for the policy is not enough." App. A at 56a. The Court must consider suitable alternatives, and when acceptable alternatives exist, it cannot be said that

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17/ A showing of a less discriminatory alternative which would establish pretext in an impact case, is merely interference by the Court in the employer's business practices if the case is one of disparate treatment. Furnco Construction Corp. v. Waters, supra.

the employer's policies, though job related, are "necessary." Robinson v. Lorillard Corp., supra, 444 F.2d at 798 n.7.

The Court's erroneous application of the reasonableness standard was based upon a totally inaccurate assumption that this Court's statement that "Courts are generally less competent than employers to reconstruct business practices", Furnco Construction Corp. v. Waters, 438 U.S. at 578 (emphasis added), was intended to limit the District Court's evaluation of the existence of equally safe, less discriminatory alternatives under the business necessity test.

Petitioners submit that the admonition in Furnco was not intended to weaken the business necessity test but rather applies in discriminatory treatment cases as a limitation on unfettered theorization regarding

possible alternative and less discriminatory employment practices.[18/]

## III. The Court of Appeals Ignored the Findings of Fact Critical to the District Court's Holding Without Finding Them to be Clearly Erroneous

The Court of Appeals held that the trial court was clearly wrong in its finding that pregnant flight attendants who may have disabling problems can be uniformly identified prior to the onset of such incidents. App. A at 24a-25a. The Court based its holding on the grounds that "[t]here is very little, if any, evidence to support that finding."

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18/ As demonstrated by a comparison of the standards set forth in discriminatory impact and discriminatory treatment cases, an employer need only show he acted reasonably and has no obligation to satisfy any of the elements of the business necessity test in a case of discriminatory treatment. See discussion supra at pp. 32-34.

In fact, there is a great deal of evidence to support the District Court's finding, and the Court of Appeals violated the clearly erroneous standard for appellate review of findings of fact. Fed. R. Civ. P. 52(a). The District Court found that (i) a "great preponderance of evidence reflects . . . that at any given time during an individual woman's pregnancy, the onset of a miscarriage or premature delivery is predictable prior to the actual disablement." App. B at 212a; (ii) warning symptoms, such as spotting and bleeding, allow for prediction "with considerable accuracy." Id. at 157a, 168a, 212a; (iii) increased girth and abdominal expansion are the factors which limit ability to perform during the twentieth through twenty-eighth weeks of a normal pregnancy, and those factors are both

measurable and readily identifiable. Id. at 164a-65a, 215a-16a; (iv) Northwest Airlines' policy, based on individualized determination, has worked "without any difficulty whatsoever." Id. at 167a-68a, 210a-11a; and (v) "the Northwest experience thus serves as empirical verification of the position of the plaintiffs' experts." Id. at 168a.

There was no finding that would support the Court of Appeals' reversal. Under the clearly erroneous standard, the Court may not reverse a finding merely because it may doubt its correctness; it may only reverse when it has "the definite and firm conviction that a mistake has been committed." Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969). The standard is not simply whether the

appellate court would have found otherwise but whether the trial court could permissibly find as it did. See Bianchini v. Humble Pipe Line Co., 480 F.2d 251, 253 (5th Cir. 1973). Judged by these standards, the Court of Appeals misapplied the clearly erroneous test in disregarding the finding that individualized determinations of potential disability can be made.

In addition, the Court of Appeals simply ignored findings of fact made by the District Court which were central to its conclusions of law. The Court neither reversed them as clearly erroneous nor did it allude to them otherwise. The Northwest Airlines' policy and Eastern's own new interim policy both undercut Eastern's pretextual safety defense, App. A at 56a, 61a-62a (J. Butzner, dissenting), yet the

Court of Appeals refused even to mention, let alone consider, these policies and their importance to the District Court's rejection of the business necessity test. See App. B at 210a-11a.

The Court of Appeals may not thus arbitrarily ignore critical findings of fact made by the lower court.[19/] See Zenith Radio Corp. v. Hazeltine Research, Inc., supra.

## IV. The Court Should Decide This Issue to Resolve the Conflicting Holdings in the Lower Courts

The importance of the question presented to this Court is heightened by the numerous suits pending in the federal

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19/ This Court noted in Bantam Books Inc. v. Sullivan, 372 U.S. 58, 68 (1963) that a finding amply supported by the record binds the Court.

courts which have challenged the policy of mandatory leave upon knowledge of pregnancy. The lower courts have reached contradictory results "impossible to reconcile." App. A at 28a.

Two cases have held that a pregnant flight attendant may work well into the second trimester. Thus, in In re National Airlines, Inc., 434 F. Supp. 249 (S.D. Fla. 1977), the Court rejected the bfoq defense as inapplicable to the first twenty weeks of pregnancy.

In Maclennan v. American Airlines, Inc., 440 F. Supp. 466 (E.D. Va. 1977), the Court held that mandatory pregnancy leave prior to the 26th week of pregnancy was invalid. The Court rejected a bfoq defense and rejected American's safety rationale. Id. at 472. It noted that Federal Aviation Administra-

tion ("FAA") regulations which "deal extensively with all aspects of the qualifications for flight crew members" had only minimal requirements for flight attendants and that the FAA had taken the position that "whether a pregnant flight attendant should fly is a matter between herself, her doctor, and her employer." Id. at 471. This case has been settled.[20/]

In contrast, the lower courts have upheld mandatory maternity leave policies in three cases.[21/] Harriss v.

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20/ Another case striking mandatory maternity leave policies is United Air Lines, Inc. v. State Human Rights Appeal Board, 61 App. Div.2d 1010 (2d Dept.), appeal denied, 44 N.Y.2d 648, cert. denied, 439 U.S. 982 (1978).

21/ In EEOC v. Delta Air Lines, Inc., 441 F. Supp. 626 (S.D. Tex. 1977) rev'd and remanded, 619 F.2d 81 (5th Cir. 1980) the trial court's grant of summary judgment in favor of mandatory maternity leave was reversed on procedural grounds.

Pan American World Airways, Inc., 437 F. Supp. 413 (N.D. Cal. 1977) appeal pending; Air Line Pilots Ass'n v. Western Air Lines, Inc., 22 E.P.D. ¶ 20,636 (N.D. Cal. 1979) appeal pending; and Condit v. United Air Lines, Inc., 12 E.P.D. ¶ 11,195 (E.D. Va. 1976), aff'd as not clearly erroneous, 558 F.2d 1176 (4th Cir. 1977), cert. denied, 435 U.S. 934 (1978).

Within the Fourth Circuit, there is inconsistency as to which defense -- business necessity or bfoq -- should apply to a prima facie case of disparate impact discrimination. In the present case, the Court of Appeals held that the business necessity defense was the only one applicable to a case of disparate impact discrimination. App. A at 37a-38a. Yet in Condit v. United Air Lines, Inc., supra,

the same circuit affirmed a bfoq defense finding as not clearly erroneous.

The confusion generated by the Fourth Circuit in switching appropriate defenses has now been compounded by intermingling the standards set forth by this Court in judging discriminatory impact and treatment cases.

## CONCLUSION

For reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

NOTICE

This opinion is subject to further editing and modification. The final version will appear in the bound volume of the official reports.*

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 78-1659

CATHERINE M. BURWELL, et al.,

Appellees,

v.

EASTERN AIR LINES, INC.,

Appellant.

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Appeal from the United States District Court for the Eastern District of Virginia, Richmond Division. Robert R. Merhige, Jr., District Judge.

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Argued: October 2, 1979
Decided: August 29, 1980

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*Petitioners have reprinted the opinion of the United States Court of Appeals for the Fourth Circuit as originally circulated by that Court.

Before HAYNSWORTH, Chief Judge, WINTER, BUTZNER, RUSSELL, WIDENER, HALL, PHILLIPS, MURNAGHAN and SPROUSE, Circuit Judges.

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Paul M. Thompson (Christine H. Perdue, A.W. VanderMeer, Jr., Hunton & Williams; William G. Bell, Richard P. Magurno, Eastern Air Lines, Inc. on brief) for Appellant; Jay L. Westbrook (Robert B. Wallace, Surrey, Karaski [sic] and Morse; David R. Cashdan; Stephen L. Spitz, Lawyers' Committee for Civil Rights Under Law on brief) for Appellees; (Issie L. Jenkins, Acting General Counsel, Joseph T. Eddins, Associate General Counsel, Beatrice Rosenberg, Assistant General Counsel, Vincent Blackwood on brief) for Amicus Curiae Equal Employment Opportunity Commission.

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PER CURIAM:

This appeal raises several issues. For reasons set forth in the accompanying three opinions, the court has decided them as follows:

1. The court unanimously affirms that part of the district court's judgment that invalidated Eastern Airline's policy requiring pregnant stewardesses to forfeit seniority when they transfer to ground positions.

2. A majority of the court affirms that part of the district court's judgment that invalidated Eastern's mandatory pregnancy leave policy for stewardesses during the first 13 weeks of pregnancy. Three judges dissent on this issue.

3. A majority of the court reverses that part of the district court's judgment that invalidated Eastern's mandatory leave policy between the 13th and 28th weeks of pregnancy. Four judges dissent on this issue.

4. The court unanimously affirms that part of the district court's judgment that upheld Eastern's mandatory leave policy from the beginning of the 28th week of pregnancy.

Judge Sprouse, with whom Chief Judge Haynsworth joins:

Eastern Airlines appeals from a judgment finding it in violation of Section 703(a)(2) of Title VII of the 1964

Civil Rights Act, 42 U.S.C. §2000e, et seq. The District Court held Eastern responsible for impermissible sex discrimination against female flight attendants in three particulars. It ruled that Eastern's policies concerning mandatory pregnancy leave, seniority for temporary transfer to ground positions and reinstatement rights after maternity leave were all violative of Title VII.

The action was brought by Catherine Burwell and Jean Proctor in the U. S. District Court for the Eastern District of Virginia, and by Sharyn Clayton in the Northern District of Alabama. The Clayton action was transferred to the Eastern District of Virginia and the actions consolidated. Also named as defendants were Local 550 of the Airline Steward and Stewardesses Association and Local 553 of the Transport Workers Union of America. There was a subse-

quent class action certification under Federal R.C.P. 23(b)(1)(2). The certified class includes all female flight attendants employed by the airlines on October 27, 1972 who may be so employed in the future and who may be subject to the challenged employment practices.

At the time of the institution of this action, 90 percent of Eastern's flight attendants were female. Attacked by the plaintiffs were five Eastern employment practices or policies. There is no factual dispute as to the existence and nature of the policies. They are or were:

(a) A requirement that flight attendants must commence maternity leave immediately upon knowledge of pregnancy;

(b) A policy that pregnant flight attendants lose all accumulated seniority if they transfer to ground positions rather than taking maternity leave; flight attendants temporarily transfering to ground positions because of disabilities other

than pregnancy continue to accumulate seniority;

(c) A policy fixing time limits on guaranteed rights to reinstatement of flight attendants taking maternity leave;

(d) The separate treatment of pregnancy under Eastern's Group Comprehensive Medical Insurance; and

(e) The exclusion of pregnancy from Eastern's paid sick leave policy and the impact of such exclusion on other conditions of employment.

The District Court ruled in favor of the defendants on the medical insurance and sick leave issues. The plaintiffs have not appealed that decision. The Court ruled for plaintiffs on the first three issues, enjoined Eastern and the union from continuing them, and assessed back pay awards against only Eastern. The unions have not appealed any ruling and are not parties to this appeal. Eastern did not appeal the rulings holding invalid Eastern's policy on rein-

statement of flight attendants after maternity leave.

The two issues remaining involve possible violations of Section 703(a), Title VII[1] by Eastern practices or policies: One, the policy requiring loss of seniority for pregnant flight attendants temporarily transferring to ground

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[1] Section 703(a) of the Civil Rights Acts, 42 U.S.C. §2000e-2(a), states:

> It shall be an unlawful employment practice for an employer-
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privilege of employment, because of such individuals race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

positions; and Two, Eastern's policy requiring forced mandatory leave upon knowledge of pregnancy.

We affirm the District Court's ruling that Eastern's seniority policy governing temporary transfer to ground positions violates plaintiffs' Title VII rights. We affirm in part and reverse in part the Court's rulings on the mandatory pregnancy leave policies.

I

LOSS OF SENIORITY UPON TEMPORARY TRANSFER TO GROUND POSITION

The facts are simple and undisputed concerning Eastern's rules relating to the temporary transfer of pregnant flight attendants to ground positions. All flight attendants incurring a temporary disability are permitted to transfer to available ground positions during the disability from flight duty. This is a right resulting from the collective

bargaining agreement which also provides that flight seniority shall continue to accrue during such temporary duty as follows:

> Section 16(b) When a Flight Attendant is transferred to non-flying duties with the Company on account of physical incapacity or because of sickness or injury, the Flight Attendant shall retain and continue to accrue seniority during such period of sickness or injury for a continuous period of (3) three years.

Section 16(d), by reference to 16(b), restricts seniority retention and accrual rights to such transferees having a "physical impairment" or "sickness or injury":

> Section 16(d) Except as provided in paragraph (b) above, Flight Attendants transferring to positions not directly related to Flight Attendant work will lose all seniority rights as Flight Attendants.

Under Eastern's interpretation of the collective bargaining agreement, the terms "physical impairment" and "sickness or injury" do not include pregnancy. But

neither "physical impairment" nor "sickness or injury" are defined in 16(b). The collective bargaining agreement, therefore, does not specifically deprive pregnant flight attendants of these seniority retention rights. Rather it is Eastern's unilateral interpretation which excludes pregnant flight attendants and results in the loss of seniority when pregnant flight attendants temporarily transfer to ground positions.

Eastern contends that this issue is governed by the Supreme Court's decision in General Electric Company v. Gilbert, 429 U.S. 125 (1976). In Gilbert the Court held that the exclusion of pregnancy from an employer-funded sickness and accident insurance program is not a per se sex-based discrimination. "Gender-based discrimination does not result simply because an employer's disability benefits plan is less than all-inclusive." 429 U.S. at

138-39.

The issue in the instant case does not involve a Gilbert determination. It is controlled instead by Nashville Gas Co. v. Satty, 434 U.S. 136 (1977). Gilbert involved insurance payments, and the exclusion of pregnancy benefits were actuarily implicit in the funding of the program. The Gas Company's practice, considered in Satty, deprived an employee returning from pregnancy leave of an employment right - all accrued seniority. Eastern's practice denying seniority to pregnant flight attendants upon temporarily transferring to non-flying duties, although different in procedure and degree, involves the same principle as Satty. The Court there said:

> On its face, petitioner's seniority policy appears to be neutral in its treatment of male and female employees. [footnote omitted]. If an employee is forced to take a leave of absence from his job because of disease or any dis-

> ability other than pregnancy, the employee, whether male or female retains accumulated seniority. ... If the employee takes a leave of absence for any other reason, including pregnancy, accumulated seniority is divested. ... It is beyond dispute that petitioner's policy of depriving employees returning from pregnancy leave of their accumulated seniority acts both to deprive them 'of employment opportunities' and to 'adversely affect [their] status as employee.'

434 U.S. at 140-41.

The Court went on to say:

> We held in Gilbert that § 703(a)(1) did not require that greater economic benefits be paid to one sex or the other "because of their differing roles in 'the scheme of human existence,'" 429 U.S. at 139 n.17. But that holding does not allow us to read § 703(a)(2) to permit an employer to burden female employees in such a way as to deprive them of employment opportunities because of their different role. (footnote omitted).

434 U.S. at 142.

So here, as in Satty, Eastern's policy appears to be neutral in its treatment of male and female employees, but its impact was solely upon women, obviously

depriving them of "employment opportunities" and adversely affecting their status as employees because "of their different role".

Eastern contends that the transfer policy as a part of its collective bargaining agreement is excepted from the operation of §703(a)(2) by the bona fide seniority system provision of §703(h) of Title VII. It is not necessary to even consider that contention. The provision of the collective bargaining upon which Eastern reportedly based this practice contains no language excluding pregnant flight transferees from its seniority provisions. It was only Eastern's unilateral interpretation that effected this grossly discriminatory result. The District Court correctly held that the temporary transfer to ground position policy is a violation of plaintiffs Title VII rights.

## II

## THE MANDATORY MATERNITY LEAVE POLICY

We next consider the issue of mandatory maternity leave upon knowledge of pregnancy.

The plaintiffs accuse Eastern of treating them discriminatorily in violation of Section 703(a) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e, et seq., hereafter Section 703(a) or Title VII. Eastern argues the policies are justified because pregnant flight personnel could impede safe evacuation of passengers and hinder other safety procedures in the event of emergencies. They also argue, with less force, that the health of the attendant and her unborn child could be endangered. Any unequal treatment due to pregnancy, it says, is required for these reasons.

The central issue is whether Eastern's mandatory leave policy is necessary to the

safe transportation of passengers as gauged by the criteria announced in Robinson v. Lorillard Corporation, 444 F.2d 791 (4th Cir.), cert. dismissed, 404 U.S. 1006 (1971), hereafter more fully discussed.

Eastern's requirement of leave upon knowledge of pregnancy is its only health related involuntary leave requirements. There are no similar requirements for leave upon knowledge of any other health condition presenting a possible work impairment. Individuals incurring non-pregnancy related health problems are evaluated individually as to their ability to perform flight duties.

Eastern relies primarily upon a voluntary reporting system by attendants as to their pregnancies. Although pregnancies are routinely not reported until after the thirteenth week of pregnancy or until after the pregnancy is visually

discernable, the duty remains on attendants to report and take leave as soon as they are aware of this pregnancy. There are no exceptions. The policy candidly prevents all pregnant flight attendants from working during pregnancy without regard to individual ability.

Creditable witnesses for both plaintiffs and defendant produced an evidentiary record detailing required performance in emergencies, some specific experiences of pregnant flight attendants during emergencies, and considerable medical testimony concerning pregnancy as it potentially affects performance of flight attendants during emergencies.

Flight attendants must be able to perform both routine and emergency duties. Non-emergency and routine duties require considerable physical exersion. Flight attendants may, on occasion, work up to fourteen-hour days. Flight atten-

dants are required to push heavy food carts. There is danger from being injured by air turbulence. Testimony reflected that Eastern flight attendants reported an average of over thirty compensable injuries from turbulence annually over a four year period.

Among emergency duties is opening doors and windows, assisting with life rafts, evacuating passengers, and proper psychological reaction to hijacking.[2]

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[2] The following list of duties was compiled by the Medical Committee of Air Transport Association.

I. PHYSICAL ACTIVITIES
Lifting--up to 25 pounds regularly, 50 pounds occassionally.
Prolonged walking.
Prolonged standing.
Repeated bending and stooping.
Occasional overhead reaching.
Kneeling.
Pushing and pulling.
Ability to withstand recurrent training.

Footnote continued on following page.

The windows on some Eastern planes

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EMERGENCY DUTIES
Hemlich maneuver.
Lift out emergency window exits--weight 30 pounds each exit.
During evacuation: carry children, push passengers down slides, crawl over seats to reach exist and/or passengers, administer first aid.
Carry out overwater ditching and survival procedures.
Assist with life raft--weight, 120 pounds.
Assist passengers into raft.
Operate emergency equipment for flight attendant's own use.
Mouth-to-mouth resuscitation.
Psychological reactions to hi-jacking and in-flight emergencies.

II. WORKING CONDITIONS
Assisting "extra care" passengers.
Cabin pressurized to 5,000 feet.
Exposed to jet engine noise.
Irregular schedules.
Occasionally long working hours (up to fourteen continuous hours).
Temperature extremes (depending upon time of year and location).
Light to severe turbulence on occasion.

weigh 45 pounds. The exit doors ordinarily require 45 pounds of pressure to open and more if the door is jammed. If the exit doors are blocked flight attendants must use alternate escape routes. During eight emergencies since 1954 flight attendants were required and did in fact perform practically all of the emergency procedures. Flight attendants have been required during specific emergencies to: climb from the airplane, climb onto the wing and open the exit windows from the outside; kick in the cockpit doors and exit through the windows which measured 16 x 18 inches; evacuate a paraplegic; evacuate several children and two invalids; evacuate intoxicated and sleeping passengers.

Eastern's evidence established that during its flying experience there had been three pregnant flight attendants incapacitated due to pregnancy related

disabilities which began during flying trips, and that other pregnant flight attendants had become incapacitated due to nausea, morning sickness, and fatigue during flight. None of this occurred during an emergency.

The medical witnesses agreed that pregnancy is normally considered in three trimesters of approximately thirteen weeks each and that roughly speaking each trimester involves different health problems; that a normal, healthy woman experiencing a normal, healthy pregnancy would have little difficulties performing the regular duties of a flight attendant until her girth has increased appreciably, (this varies by individual, but most often occurs shortly after the first trimester); that disabilities from abnormal pregnancy could prevent a flight attendant from performing either ordinary or emergency duties; that some of these disabilities

are predictable as to individual women but some are unpredictable.

They also agreed that ten percent of all pregnancies result in miscarriages and ninety percent of these occur during the first trimester of pregnancy. Very few miscarriages can be predicted as to individual women. The medical experts and sources (including the Mayo Clinic, the doctors associated with Airline Transport Association and even some Eastern sources) point to the virtual unanimous conclusion that a pregnant flight attendant can adequately perform routine and emergency duties through the thirteenth week of pregnancy. The uncontradicted testimony was that pregnant women should not continue to work as flight attendants beyond the twenty-eighth week of pregnancy.

There was conflicting testimony concerning morning sickness, dizziness,

fainting and the treatment of these conditions; anemia; placentia prania; toximia; rupture of the marginal sinus; abruptia placentae; as to when these conditions occur; and the causitive effect of physical exertion during routine and emergency procedures.

There have been no emperical studies nor evidence concerning the effect of flight duty upon an unborn child. Likewise there are no reliable statistics concerning the actual performance of pregnant flight attendants during emergency evacuations or other emergencies.

The trial court resolved conflicts in medical testimony principally in favor of the plaintiffs. The court, in a mixed finding of fact and law, found that for the first twenty weeks following conception a flight attendant undergoing a normal pregnancy can perform both normal and emergency duties as well as a non-

pregnant flight attendant, that between twenty and twenty-eight weeks some can not but they can be identified, and as of the twenty-eighth week of pregnancy virtually all pregnant flight attendants should discontinue working as flight attendants. Its legal conclusion was that during the first thirteen weeks, flight duty should be entirely the choice of the flight attendant; from thirteen to twenty weeks, Eastern could require monthly written permission of her doctor; from twenty to twenty-eight weeks, flight duty could be conditioned on weekly permission from her doctor, and she could be prohibited flight duty after the twenty-eighth week.

The trial court concluded that the plaintiffs established a prima facie case of disparate impact discrimination;[3] that

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[3] See Teamsters v. U.S., 431 U.S. 324 (1977).

the defendant did not prove either a bona fide occupational qualification defense (hereafter BFOQ)[4] nor a business necessity defense;[5] and that even if a defense had been established it was, in part, a pretext.

We think the trial court was clearly wrong in its finding that pregnant flight attendants who will experience abnormal

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[4] This defense is provided in Section 703(e) of Title VII, 42 U.S.C. §2000e-2(d) as follows:

> Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees ... on the basis of [their] religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.

[5] The Business necessity test was first announced in Griggs v. Duke Power Co., 401 U.S. 424 (1971). To be successful an employer must show that the practice bears a manifest relation to the employment. 401 U.S. at 432.

health incidents during their pregnancies can be uniformly identified prior to the onset of such incidents. There is very little, if any, evidence to support that finding. We do not otherwise disturb the district court's findings of subsidiary facts relating to the characteristics of pregnancy for it was in the traditional better position to consider conflicting expert evidence than are we. We differ, however, in the legal application of these and other facts to the business necessity defense.[6]

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[6] The district court concluded that there was an acceptable alternative available to Eastern by which it could equally accomplish its purpose with lesser differential impact. That is it could set a later date for its mandatory leave requirement. That legal conclusion, however, is dependent primarily on the finding that there were bare bones mechanical procedures available to obtain written doctor's approvals for pregnant attendants weekly between the 13th and 20th week, and monthly between the 20th and 28th week.

Footnote continued on following page.

The Supreme Court has twice considered

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The testimony of medical experts, however, indicated only that abnormal health problems connected with pregnancy could usually be identified prior to an attendant commencing a specific flight.

That is not sufficiently specific to assist management, unions, or individual flight attendant devising safety procedures to prevent the one catastrophe that might occur while in flight safety procedures that must be anticipated, not critiqued, after a catastrophic crash.

To be probative, supportive facts should have included reasonably specific percentages of flight attendants identifiable prior to flights as having health difficulties with their pregnancy; the types and nature of possible health problems identifiable; experience, if any, from industrial health experts from other industries concerning results of predicting pregnancy problems of women employees; and evidence that doctors would be willing to accept responsibility of making risk judgments concerning safety of unknown passengers rather than make "probability" judgments as to the health of patients - for medical practice and patient convenience. It is only this kind of fact-finding that is subject to the FRCP 52 "clearly erroneous standard." The ultimate conclusion that these facts demonstrate vel non reasonably acceptable alternatives is a conclusion of law.

equal fringe benefit treatment of pregnant women in voluntary non-working status[7] but has not decided a case in a Title VII context[8] involving an employer prohibiting outright a woman from working because of her pregnancy. We are presented with that question.

The enactment of Section 703(a) understandably generated prolific litigation by female airline flight attendants attacking numerous employment practices in the airline industry. None have been more difficult to judicially determine than the issue created by the previously universal airlines practice requiring mandatory pregnancy leave by

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[7] General Electric Co. v. Gilbert, 429 U.S. 125 (1976); Nashville Gas Co. v. Satty, 434 U.S. 136 (1977).

[8] See Cleveland Board of Education v. LeFleur, 414 U.S. 632 (1974) holding invalid under due process standards certain arbitrary mandatory maternity leave requirements for public school teachers.

female flight attendants at various stages of pregnancy. The most common airline rule has been to require maternity leave upon knowledge of pregnancy. A number of courts have decided this issue, considering basically the same quantity and quality of evidence. A number of the same medical experts have appeared in cross-sections of the decided cases. Some courts have considered virtually the same medical testimony, and have reached such contradictory results that it is impossible to reconcile them:

> National Airlines could not require maternity leave during the first thirteen weeks of pregnancy, but as a bona fide occupational qualification could condition flight duty between the thirteenth and twentieth week, and could prohibit such duty after the twentieth week of pregnancy. In re National Air

Lines, Inc., 434 F. Supp. 249 (S.D. Fla. 1977);

Pan American World Airways could, both as a "business necessity" and a bona fide occupational qualification, require maternity leave upon knowledge of pregnancy. Harriss v. Pan American World Airways, Inc., 437 F. Supp. 413 (N.D. Calif. 1977)(Judge Schwazer);

Western Airlines could require leave upon knowledge of pregnancy. Air Line Pilots Association, et. al. v. Western Air Lines, Inc., 22 E.P.D. ¶30,636 (N.D. Calif. 1979);

Delta Airlines could require maternity leave upon knowledge of pregnancy, as a bona fide occupational qualification. EEOC v. Delta Air Lines, Inc., 441 F. Supp. 626 (S.D. Tex. 1977).

Three district court opinions in this Circuit reach different factual and legal

conclusions from similar medical and non-medical evidence:

United's requirement that flight attendants stop flying upon the knowledge of pregnancy was held to be a bona fide occupational qualification permitted by §703(e). Condit v. United Airlines, Inc., 12 E.P.D. ¶11,195 (Affirmed as not being clearly erroneous under F.R.C.P. 52(a) standards. Condit v. United Airlines, Inc., 558 F.2d 1176 (4th Cir. 1977), cert. denied, 435 U.S. 934 (1978).

American could not require its pregnant flight attendants to take maternity leave until after the twenty-sixth week. Maclennan v. American Airlines, Inc., 440 F. Supp. 466 (E.D. Va. 1977);

Eastern's right to restrict flight duty was held to vary through

four different periods of pregnancies, i.e., the first thirteen weeks; thirteen to twenty weeks; twenty to twenty-eight weeks; and twenty-eight weeks to termination of pregnancy. Burwell v. Eastern Airlines, Inc., 485 F. Supp. 474 (E.D. Va. 1978)(the case sub judice).

The initial burden of Title VII plaintiffs is to show a prima facie case of employment discrimination - the burden then shifts to the defendant to prove, articulate or show a defense to the apparent discrimination. If the plaintiff, in turn, can show that the proffered employer defense is a pretext, they may still prevail. McDonnel Douglas Corp. v. Green, 411 U.S. 792 (1973); Albemarle Paper Company v. Moody, 422 U.S. 405 (1975).

Plaintiffs may, under current Title VII jurisprudence, prove a prima facie

case of employment discrimination under one of two clearly defined theories: discrimination by disparate treatment or discrimination by disparate impact.

> "Disparate treatement" such as is alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. ... Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII. ... Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. ... Proof of discriminatory motive, we have held, is not required under a disparate-impact theory. Compare, e.g., Griggs v. Duke Power Co., 401 U.S. 424, 430-432, with McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-806. ... Either theory may, of course, be applied to a particular set of facts.

Teamsters v. U.S., 431 U.S. at 335-36, n.15.

Eastern's mandatory maternity leave requirements, although facially neutral, affect only one class of employees - female flight attendants - and have a disproportionate impact on their employment opportunities. This establishes a prima facie case of disparate impact employment discrimination.[9] Eastern then, at trial, had the burden of defending against the prima facie discrimination by demonstrating a legitimate justification for its policy.

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[9] Disparate treatment and disparate impact theories may be present as alternative grounds for relief in the same case. If sufficiently supported by the evidence, either may be analyzed by the trier of fact as alternative grounds for relief. Wright v. National Archives and Record Service, No. 77-1543 (4th Cir. 1979). However, "a claimant's path after establishment of a prima facie case is considerably easier under the impact theory than under the treatment theory, and the same probably holds true for relative ease of proof analysis by courts." Wright, supra.

The trial court, recognizing some confusion in Title VII sex discrimination cases as to whether a BFOQ defense[10] or a business necessity defense[11] applies to a

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[10] The criteria for judging a BFOQ defense was expressed in Arritt v. Grisell, 567 F.2d 1267 (4th Cir. 1977), an age discrimination case:

> the burden is on the employer to show (1) that the BFOQ which it invokes is reasonably necessary to the essence of its business (here the operation of an efficient police department for the protection of the public), and (2) that the employer has reasonable cause, i.e., a factual basis for believing that all or substantially all persons within the class (in our case, persons over 35 years of age) would be unable to perform safely and efficiently the duties of the job involved, or that it is impossible or impractical to deal with persons over the age limit on an individualized basis.

Id. at 1271.

[11] The criteria for establishing this defense has been no where better stated than in Robinson v. Lorillard, 444 F.2d 791 (4th Cir.), cert. dismissed 404 U.S. 1006 (1971), infra.

disparate impact type discrimination, tested Eastern's evidence under both theories.[12] Despite the trial court's understandable dilemma, "business necessity" is the test that should have been applied.

Business necessity as a defense was first defined by the Supreme Court concommitantly with the recognition of disparate impact discrimination. Griggs v. Duke Power Co., 401 U.S. 424 (1971). BFOQ was explicitly created

[12] Considering both a business necessity and a BFOQ defense applicable in mandatory pregnancy leave cases, See Harris v. Pan American, supra; Eastern Air Lines, Inc. v. Burwell, supra. Many courts have considered both a "business necessity and a BFOQ defense available in a disparate impact case. See also Schlei and Grossman, Employment Discrimination Law 1160 (1976) where, in the author's opinion, the available defenses are a "business necessity, a bona fide occupational qualification or some other explanation which demonstrates that the substantial disparate impact is not the result of unlawful discrimination."

by statute [703(e)] as a defense to the equally explicit disparate treatment discrimination of § 703(a)[13] To say, however, that the two defenses are mutually exclusive, and each confined to a separate theory of liability would be overreaching. In sex discrimination cases, however, a clear disparate impact discrimination will be tested by business necessity and

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[13] The logical equation would seem to be: a prima facie case of disparate treatment discrimination, a BFOQ defense; a prima facie case of disparate impact discrimination, a business necessity defense. There is, however, a "clinker" in this otherwise symmetrical reasoning. Congress, in §703(a), prohibited employment discrimination based on race, color, religion, sex, or national origin. The statutory BFOQ defense, however, is pointedly restricted to religion, sex or national origin - it is not permitted as a defense to race discrimination in employment. In Title VII disparate treatment race cases the appropriate defense is usually expressed as the employer "articulating some legitimate, non-discriminatory reason" for its action. McDonnell Douglas v. Green, 411 U.S. at 802; Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978).

a clear disparate treatment discrimination will be tested by a BFOQ defense. Dothard v. Rawlinson, 433 U.S. 321 (1977).[14]

The task of testing the validity of Eastern's justification therefore is simplified since business necessity is an appropriate employer defense. It is not necessary to consider if a

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[14] In Dothard the Supreme Court considered two alleged sex discriminations by the Corrections Department, State of Alabama in the administration of its prison system. The first was by a facially neutral statute which was characterized as a disparate impact discrimination, and tested by a business necessity defense. The second was a specific discrimination against women, characterized as a disparate treatment and a BFOQ defense applied. Dothard v. Rawlinson, supra. See also Schlei and Grossman, supra at 292.

BFOQ defense[15] might also apply or whether it might be an appropriate defense consideration in some disparate impact discrimination cases.[16]

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[15] Even if it were proper to test Eastern's practice as a BFOQ, it is doubtful that the defense would be successful since this test has an extremely narrow application. Dothard v. Rawlinson, 433 U.S. at 333.

[16] It is possible to conceptualize employment practices producing separate factual grounds to sustain disparate impact and disparate treatment discriminations or circumstances which might be confused as to which theory would apply. It would seem, in such cases, that the judicial flexibility which has evolved in Title VII cases should permit the application of either theory and except in race cases, either defense. Although announced in a different context, the court's language in Furnco would indicate this direction for this area of Title VII procedure.

Footnote continued on following page.

To successfully justify its different treatment of women flight attendants as a business necessity, Eastern must show that its challenged practice bears

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Footnote 16 continued from previous page

> This, of course, was not intended to be an inflexible rule, as the Court went on to note that '[t]he facts necessarily will vary in Title VII cases, and the specification ... of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations.

438 U.S. at 575-76 (commenting on the McDonnell Douglas formula for establishing a prima facie case).

> The method suggested in McDonnell Douglas for pursuing this inquiry, however, was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination.

438 U.S. at 577 (commenting on the procedural scheme for analyzing a Title VII case).

Footnote continued on following page.

a manifest relation to the flight attendants employment - that it is related to their job performance. Griggs v. Duke Power Co., 401 U.S. at 431. If the job related qualification is bona fide, it may "measure the person for the job and not the person in the abstract." Dothard v. Rawlinson, 433 U.S. at 332, citing Griggs, 401 U.S. at 436.

We measure the mandatory maternity leave policy by the criteria expressed in Lorillard:

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Footnote 16 continued from previous page

The potential for violations are so variable that the Supreme Court has simply devised new judicial tools for analyzing of Title VII cases. It is significant that although the Court throughout Title VII opinions speaks in terms of disparate treatment, disparate impact, BFOQ, business necessity, etc., that it cites the same general principles of Title VII law in all type cases.

> ...The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact [footnote omitted]; the challenged practice must effectively carry out the business purpose it is alleged to serve [footnote omitted]; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential impact [footnote omitted].

Robinson v. Lorillard, 444 F.2d at 798.

Eastern's contention that an element of business necessity is its consideration for the safety of the pregnant flight attendant and her unborn child is not persuasive. If this personal compassion can be attributed to corporate policy it is commendable but in the area of civil rights, personal risk decisions not affecting business operations are best

left to individuals who are the targets of discrimination. Its contention that the leave policy is legitimately designed to enhance the safety of passengers meets with more success. Focusing all the evidence at trial through the criteria of Lorillard demonstrates that Eastern's policy as it relates to pregnancy after the thirteenth week results from the legitimate business necessity of safely transporting passengers.[17]

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[17] This case was not constricted by inadequate evidentiary procedures at trial nor is it necessary to involve the "proof" problems of Furnco, supra, and Sweeney v. Board of Trustees, 439 U.S. 24 (1978), to determine in this business necessity setting whether an employer must "articulate" or must "prove" its defense.

Footnote continued on following page.

One -- Eastern's evidence at trial was that a mandatory leave policy was necessary to the safe and efficient operation of its business. There is no evidence that it acted on contrived advice nor was its witnesses discredited at trial. There is nothing in the record to indicate that Eastern was not persuaded by the medical and operational information available to it. At the most Eastern knew of opposing medical views as

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Footnote 17 continued from previous page

Here the discrimination charges and defense were as fully presented as they could be under any order of proof. The burden of proving the defense is on the employer. The burden of persuasion ultimately falls on the plaintiffs, to show an acceptable alternate practice or that Eastern's defense was a pretext. This breaks no tradition for the burden is no heavier than that of the traditional proponent.

The district court properly considered the factual issues under the preponderence standard, but it erred in viewing Eastern's business necessity too narrowly.

to the effects of the first to twenty-eighth week of pregnancy on the ability of its flight attendants to perform in emergencies.

Medical opinion concerning characteristics of pregnancy both available to Eastern and offered at trial was clinical in part but in large part subjective. The non-medical operational opinions were based on scant statistics. Happily the relatively low number of serious emergencies in the airline industry have afforded few statistics relating to the job performance of pregnant flight attendants. Doctors opinions as to possible effects of health conditions on safety in industry are, of course, crucial. They are certainly important in this narrow field of the Civil Rights law, and Courts with some ease can judge which of the medical experts

are more persuasive. Neither airlines, doctors, or courts, however, possess the clairvoyance necessary to chart exact percentages of risk of an in-flight disaster. The ultimate chore of managing risks to passengers, nevertheless, falls to the airline, and in deference to the complexity of the task a court should not facilely substitute a judicial judgment that the resultant leave policy is unnecessary to the safe and efficient transportation of passengers.

Two -- The plaintiffs do not seriously contend they should engage in flight duty after the twenty-eighth week of pregnancy. The adverse impact of the challenged leave policy on women flight attendants, then is to deprive them of fifteen weeks of employment during a pregnancy. We do not minimize the importance of that working

time to individual women who may desire and need the income which they would earn. In choosing between two critical values, however, passenger safety is sufficiently compelling to override this impact.

Three -- Once it is assumed the business purpose is legitimate, there is no question but that the practice effectively carries out that purpose.

Four -- There is little, if any, evidence to indicate that required maternity leaves could be determined on an individual basis in such a way as to equally accomplish the purpose with a lesser differential impact.

Tested by these standards, however, there is no credible evidence supporting Eastern's contention that pregnancy during the first thirteen weeks is a factor that might affect the safety of its passenger operation.

## III. The Question of Pretext

The plaintiffs contend that even if there is an apparent job related reason for Eastern's leave policy, it is in fact a pretext erected by the airline to camouflage its discriminatory intent. If this contention is correct, the plaintiffs would prevail despite an apparent business necessity.[18]

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[18] The concept of pretext as a part of the plaintiff's proof was first recognized in McDonnell Douglas, supra, a disparate treatment case. In Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), a disparate impact case, the Supreme Court characterized this rebuttal phase of a plaintiff's case by stating "It remains open to the complaining party to show that other tests or selection devices without a similar undesirable racial effect, would also serve the employer's legitimate interest in efficient and trustworthy workmanship." (The Court went on to state that such a showing would be evidence of employer "pretext".) Since this is essentially equivilent to one element of the Lorillard business necessity test, it might appear that the scheme of

Footnote continued on following page.

The trial court bifurcated Eastern's alleged pretext according to the period of pregnancy. It held the justification for mandatory leave

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Footnote 18 continued from previous page

proof implicit in Lorillard, supra, absorbs the "pretext" function in disparate impact/business necessity cases. Subjective motivation of the employer plays no role in determining whether "business necessity" is a legitimate defense. It would seem, since "pretext" is subjective in nature, it would not be part of the scheme of proof in disparate impact cases. The Supreme Court, however, appeared to use it in that context in Albermarle. I would not approve or disapprove its use here. The legitimacy of Eastern's "business necessity" must be decided from objective facts. If a district court, however, wishes to view the fact from different prospectives, it should not be inhibited by sematic obstacles from using any tool that might be helpful in resolving these difficult legal/factual questions. In light of the Furnco announced elasticity of analysis, a trial court should not be formalistically precluded from utilizing pretext even in disparate impact cases if viewing the employers' actions from that prospective contributes to the objective understanding of whether the practice is necessary.

prior to the twenty-eighth week to be a pretext, but found pretext not involved in Eastern's decision that leave after the twenty-eighth week of pregnancy was a business necessity.

The court found that Eastern had a long history of sex-based discriminatory employment practices. Other evidence of pretext was its failure to check on the health conditions of flight attendants generally, and its lack of diligence in policing the mandatory leave requirements. There is no doubt that Eastern has a long history of blatant employment discrimination based on sex. There was no attempt to camouflage, for these were standard airline practices. It is also true that the policing of health conditions largely relied on voluntary information provided by the affected flight attendant.

The long history of sex discrimination by Eastern and airlines generally certainly makes suspect the claim of business necessity for any employment practice resulting in a prima facie discrimination. We cannot say, though, that the malevolent history automatically poisons every employment practice. Although the history is a heavy evidentiary factor, each practice must be judged as to its purpose, and each Albemarle alternative practice advanced by plaintiffs must be gauged in light of this avowed purpose.

The courts in the Civil Rights area tread the hard drawn line between preventing the abuse of individuals and interfering in legitimate business intercourse. If employers do not meet the humane standards of Title VII in its relations with employees the courts, if necessary, will order corrective

action, but there are limits to such judicial relief. As stated in Furnco: "Courts are generally less competent than employers to reconstruct business practices, and unless mandated to do so by Congress they should not attempt it." Furnco v. Waters, 438 U.S. at 578. The Furnco admonition applies both to determining if there was a business necessity for the leave policy and whether there was pretext in establishing it.

Simply stated, the necessity for limiting the flight duty of pregnant attendants was part of Eastern's program to maximize the safety of its passengers. Safety practices of this nature are not designed to govern a certain disaster. Risk management involves the elimination of potential impediments to safety before they materialize into unfortunate

realities. To require safety management to predict with exactness human factors involved in such a variable emotional and physical experience as pregnancy is to require the impossible. Pretext might easily be found if a newspaper, a public school system, or a law firm discriminatorily chooses a course of action resulting in the prevention of women employees working during any phase of pregnancy, but an industry with a primary function of managing the safety of large numbers of passengers must be allowed more latitude. It legitimately is required to scrutinize more closely the ability of a woman to perform during different stages of pregnancy. Her safety properly should be left for her consideration but if the physical or emotional aspects of pregnancy could affect the performance of

a primary business objective, it is properly for the employer to consider. It is emphasized that the correctness of Eastern's "business necessity" termination is not judged by its subjective motivation. "Business necessity" as a defense succeeds or fails on objective necessity based on facts available to it at the time it designed the controverted policy.

Despite computerized resolution of the logistics of mass transportation, there remains to simple business judgment many choices which can not be computerized. Subjective good faith is not enough to justify sex discrimination as a business necessity, yet in objectively weighing the necessity against the Lorillard standards, the test is not whether each underlying assumption is ultimately proved to be correct. The Lorillard tests are

satisfied if all information available to the employer reasonably requires the challenged personnel practice in order to achieve an overriding business purpose. The employer's actions must be contemporaneously judged - not tested by hypothesis that are not provable or which would require unreasonable experimentation with it's business in order to prove the validity of it's decision. These considerations lead us to the belief that Eastern legitimately established the disputed leave policy as a business necessity.

Accordingly, this case is affirmed in part and reversed in part and remanded to the district court for action consistent with this opinion.

AFFIRMED IN PART,
REVERSED IN PART and
REMANDED

Judge Butzner, with whom Judge Winter, Judge Hall, and Judge Phillips join, concurring in part and dissenting:

I concur in affirming the district court's judgment that Eastern could not require pregnant stewardesses to forfeit their seniority rights upon temporary transfer to ground work. Furthermore, I agree with the conclusions reached in Part II of Judge Sprouse's opinion that Eastern cannot impose its mandatory leave policy during the first trimester of pregnancy and that it can impose this policy after the 28th week of pregnancy. I also agree that Eastern has not justified its maternity leave policy on the ground that it promotes the safety of its pregnant stewardesses and their unborn children.

The district court ruled that

Eastern must evaluate on an individual basis the ability of each stewardess to perform her duties between the 13th and 28th weeks of her pregnancy. I dissent from the reversal of this aspect of the district court's judgment. It is founded on the correct application of Title VII of the Civil Rights Act of 1969 to facts that are amply supported by the record.

I

As Judge Sprouse's opinion lucidly demonstrates, Eastern's mandatory pregnancy leave policy has a disparate impact on the stewardesses as a class. Therefore, it can be sanctioned only if it is "necessary to the safe and efficient operation of the business." Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir. 1971). Voicing a rational justification for the policy is not enough. When, as here, a com-

plainant has established a prima facie case of discrimination by showing that an employment policy has a disparate impact on the protected class, and the employer has shown that its policy is job related, a court's analysis must proceed to what I consider the critical issue in this case. This is the question of suitable alternatives to the challenged policy. The Supreme Court has aptly phrased this issue for us: "[I]t remains open to the complaining party to show that other tests or selection devices without a similarly undesirable racial [or sex-based] effect would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'" Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975). Judge Sobeloff reached the same conclusion in Robinson v. Lorillard Corp., 444 F.2d 791, 798

(4th Cir. 1971), where, speaking of the business necessity defense, he said, "[T]here must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial [or sex-based] impact." If such alternatives exist, it cannot be said that the employer's business practice, though job related, is necessary. 444 F.2d at 798 n.7.

The district court adhered to these precepts. It recognized that Eastern's policy was job related, but it found from the evidence that alternative measures would serve Eastern's legitimate interests. In part II I will attempt to demonstrate within the brief confines of a dissenting opinion that, although the evidence conflicted, the district court's findings

of fact are amply supported by the record. But first, one other aspect of the law deserves comment.

Acceptance of Eastern's policy cannot be predicated on the company officials' assertion of a bona fide belief that it is jusitifed. The principles that govern discriminatory impact cases and the business necessity defense are explained in Griggs v. Duke Power Co., 401 U.S. 424 (1971). There, speaking of an employer's lack of discriminatory intent, the Court said, 401 U.S. at 432:

> But Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.

Griggs persuades me to reject Eastern's thesis that its bona fide belief in the utility of its mandatory pregnancy

policy should determine the outcome of this case. The company's reliance on Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978), does not compel a different conclusion. Furnco dealt with a type of discrimination that has been described as disparate treatment. In such cases the complainant must prove discriminatory motive. In contrast, a complainant need not prove discriminatory motive in a case that discloses discriminatory impact. See generally Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977).

II

The district court, of course, is the appropriate and best judge of the evidence. We may reject its findings only for clear error. Fed. R. Civ. P. 52(a); United States v. United States Gypsum Co., 33 U.S. 364, 394-95

(1948).[1] Expert witnesses presented conflicting views about the effects of pregnancy on a stewardess's ability to do her job. The district court resolved these conflicts and found from the evidence that alternative measures, short of grounding all pregnant stewardesses, could reconcile Eastern's legitimate interests with the Act's prohibition of sex-based discrimination.

The most comprehensive empirical evidence in the record about the routine operation of an airline that does not have a mandatory pregnancy leave policy fully sustains the district court. Northwest Airline ste-

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[1] This familiar principle of appellate review dictated affirmance of the district court in Condit v. United Air Lines, 558 F.2d 1176 (4th Cir. 1977).

wardesses continue to work until the 28th week of pregnancy if physicians certify to their abilities.[2] Northwest's policy recognizes, as did the district judge, that pregnant stewardesses can and should be evaluated on an individual basis. Northwest adopted this policy after consulting with medical experts of the Division of Obstetrics and Medical Gynecology at the Mayo Clinic. These experts concluded that pregnancy did not affect all stewardesses' abilities until late in gestation. Northwest's medical advisor, a diplomate in Aviation Medicine and a former president of the Aerospace Medical Association, testified that Northwest had experienced no operating diffi-

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[2] Eastern's interim policy, discussed infra at pp. 9-10, adopts essentially the same procedures.

culties during the two years that this policy had been in force, although many women had been flying while pregnant.

A recognized expert in gynecology and obstetrics, who had done considerable work on the effects of high altitude on fetal development, testified that the increasing weight gain and girth that accompany pregnancy are the principal incapacitating factors for work as a stewardess. He discounted the significance of most of the typical complications of pregnancy, such as fatigue, morning sickness, fainting, varicose veins, and clumsiness. He stated that the average stewardess would retain her abilities unchanged through the 20th week of pregnancy, and that, for 20 to 28 weeks, ability would depend on the individual. He believed that, although it is impossible to

predict beforehand which pregnancy would produce disabling complications, such complications usually can be diagnosed during the course of pregnancy before disability. He also asserted that pregnant stewardesses before 28 weeks are at no greater risk of trauma than non-pregnant stewardesses. He considered the risk of miscarriage, which he admitted could be disabling, no greater than the risk of a male steward's suffering from appendicitis or a heart attack while in flight.

The stewardesses' other medical witness, an author of a major treatise on obstetrics who also qualified as an expert in gynecology and hematology, testified that he believed pregnant stewardesses should and could be evaluated on an individual basis. He stated that pregnancy generally produces no

appreciable change in strength or in the ability to perform physical work before the 28th week. He also testified that trauma severe enough to disable a pregnant stewardess would likely incapacitate a non-pregnant stewardess.

Although Eastern's medical experts were firm in their opinion that pregnant stewardesses should not be permitted to fly, their testimony, fairly read, reveals that they, too, recognized that pregnancy's effects differ from individual to individual. They acknowledged that some pregnant women could possess the capacity to perform all routine and emergency tasks required of a stewardess. On cross-examination, Eastern's principal expert witness said that he permits his pregnant patients, depending on their individual capacities and experience, to continue to work, ride horses, ski, and water ski.

Another airline witness testified that he allows his pregnant patients at 20 weeks to play tennis, and that from his observation a stewardess's duties were not more exhausting than tennis.

All of the experts agreed that miscarriage, which occurs unpredictably in about ten percent of all pregnancies and for which no effective treatment exists, could incapacitate a stewardess if it happened during a flight. The experts also agreed, however, that miscarriages are preceded by obvious and recognizable symptoms that would permit, in the vast majority of cases, a stewardess to remove herself from a flight sequence. Also, the testimony disclosed that 90 percent of all miscarriages occur within the first 12 weeks, a period, as the district court noted, during which Eastern's stewardesses have been flying routinely.

The record establishes that Eastern's mandatory leave rule evolved from policies that were inherently discriminatory in their treatment of women. From the late 1950's until 1972, Eastern hired only single women as flight attendants; during this period males were excluded. Until the mid-1960's, Eastern fired any woman who married. Up to 1965, Eastern also fired any woman who became pregnant. It retained this option until 1970, at which time without conducting any study to determine whether pregnancy impairs stewardesses' ability to work, it adopted the rule requiring stewardesses to take unpaid leave when they became pregnant. Although aware that other airlines safely operated with less restrictive policies, Eastern has made no effort to administer its policy on an individual basis.

There is no dispute that Eastern's rules dealing with pregnancy differ from its regulations for other physical conditions. Apart from its pregnancy policy, the airline has no written guidelines governing fitness of its flight attendants; nor does it routinely examine them. Eastern's medical director testified that the airline's normal method of handling physical and mental disabilities, other than pregnancy, is to rely upon self-monitoring. If a stewardess, who is not pregnant, fails to remove herself from a flight when she is incapable of performing, the airline expects complaints from fellow workers or passengers to reach the medical department, which investigates each individual case as necessary. Eastern permits stewardesses with controlled diabetes and controlled epilepsy to fly under

supervision of the medical department, even though medical experts testified that these conditions are more likely to be disabling than pregnancy. The district court found, and Eastern does not dispute, that maternity is the only disability for which Eastern requires stewardesses to take leave without pay.

The district court noted that Eastern's enforcement of its own policy is remarkably lax. A number of stewardesses testified to having worked while pregnant without experiencing difficulties. Eastern's only methods of ensuring compliance are voluntary reporting and visual detection. As a result and as Eastern is aware, stewardesses commonly fly through the 12th and 20th weeks of pregnancy. Eastern recounted incidents of stewardesses removing themselves from

flight sequences because of pregnancy-related disabilities; on these occasions the stewardesses followed the practice approved for other sicknesses or disabilities. Eastern did not produce, however, any evidence that its lax administration of its rule creates any risk to its passengers.

While this case was pending on appeal, Eastern altered its leave policy to comply with New York law.[3] The new regulations, which Eastern terms "interim," allow a stewardess to continue working while pregnant as long as her doctor or Eastern's medical department certifies her capability. The new policy affords a stewardess sick leave benefits only after a doctor certifies that she is unable to continue working.

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[3] Without objection from the appellees, Eastern supplemented the record by filing a copy of its current regulations.

Before that time a pregnant stewardess, if she desires not to work, must take unpaid leave. The adoption of this rule further supports the district court's conclusion that the mandatory ban of all pregnant stewardesses was not a business necessity. The new policy demonstrates that individual evaluation is a suitable alternative that does not sacrifice airline safety.[4]

The district court's judgment requiring Eastern to modify its mandatory pregnancy leave policy by evaluating stewardesses on an individual basis is amply supported by the record, and it conforms precisely to the principles

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[4] Eastern's explanation of its new policy discloses that United, which prevailed in Condit v. United Air Lines, 558 F.2d 1176 (4th Cir. 1977), has revised its rule to conform to New York law. See United Air Lines, Inc. v. State Human Rights Appeal Board, 61 App. Div. 2d 1010 (2d Dept), appeal denied, 44 N.Y.2d 648, cert. denied, 439 U.S. 982 (1978).

explained in Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975), and Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir. 1971). The district court, however, did not have an opportunity to consider Eastern's new policy. Therefore, I would remand this case with directions to the district court to consider the propriety of amending its decree in the light of the regulations that Eastern has now adopted.

MURNAGHAN, Circuit Judge, concurring in part and dissenting in part:

With respect to the special provision causing a pregnant employee to lose seniority accrued as a flight attendant in the event of transfer to a position not directly related to flight attendant work, I am in complete agreement with the majority. Sickness and injury are exceptions but pregnancy is not. I fail to perceive any justifiable reason for according pregnant employees, necessarily all female, less favorable seniority treatment than that accorded any other employee who is obliged for reasons of physical condition temporarily to cease flight service. Nashville Gas Co. v. Satty, 434 U.S. 136 (1977).

However, I do not agree entirely with the disposition which the majority has decided is appropriate with respect to a rule which Eastern Airlines, Inc.

had adopted requiring that, immediately upon pregnancy, an employee without exception became ineligible for flight service and, absent a transfer to other employment, had to enter unpaid maternity leave status until after termination of the pregnancy by birth of a child or otherwise and the return of the employee following recover from any attendant incapacity. The district court did acknowledge a limited validity for the rule but restricted its application to the third trimester (i.e. after the twenty-eighth week). The majority would permit enforcement of the rule during the second and third trimesters, but not the first (i.e., not during the first thirteen weeks). I respectfully submit that reasons indicating a substantial growth in the safety risks, even in the first thirteen weeks, suffice to allow enforcement of the rule as promulgated by Eastern.

Title VII has generated enough litigation that cases under it have achieved a language, if not altogether a life, of their own. Predominantly concerned with race and sex, they first command an inquiry into whether there has been, at least prima facie, discrimination. Apart from blatant examples, which would require little in the way of a special lexicography, the cases have generally spoken in terms of disparate treatment and disparate impact as conditions which, when established, demonstrate the existence prima facie of discrimination.

The cases, for these initial purposes, break down into at least two very distinct categories, one of which has little or no pertinence to our present inquiry. In all the cases where discrimination is asserted, there is a palpable difference between the favored and the disfavored individuals or groups

of employees or prospective employees. Without one, indeed, it would be difficult if not impossible to identify race or sex, standing alone, even as a possible, let alone a probable cause for difference in treatment to the disadvantage of the minority group member or the woman. A black is distinguishable from a white, a man from a woman, through simple observation.

The heart of anti-discrimination can be summed up by the observation that while there <u>is</u> a difference it does not, and, but for exceptional circumstances, may not <u>make</u> a difference. The mere fact of skin hue, or physical configuration, is essentially irrelevant to how well a job can be performed and so normally may not be taken into account. Employers have on occasion, where the differentiations on grounds of color or of sex admittedly do not, of themselves, allow

different treatment, shifted ground to something less immutable than skin color or other permanent physical differentiating characteristic and introduced standardized testing, avowing that the purpose is solely to secure better qualified employees, regardless of race or sex. The test may suffice to provide an acceptable basis for hiring practices, although statistically a minority or women do less well on the tests, if the tests are "job-related"; if they bear a "manifest relationship to the employment in question." New York City Transit Authority v. Beazer, 440 U.S. 568, 587 & n.31 (1979); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

Those are cases,[1] however, involving a total ban on the differentiating and

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[1] As is also Teamsters v. United States, 431 U.S. 324 (1977).

immutable race and sex characteristics to justify less favored treatment to a minority or female individual or group, since they bore, in the posture of the cases as they arose, in no way on qualifications to perform the work. Instead, attempted justifications for treating the plaintiff or plaintiffs less well related only to supposed acculturation aspects of the job applicant which were not unchangeable and which could be improved to his or her benefit. Our present case is very different in that an immutable differentiating characteristic is the aspect of things on which difference in treatment is based, and is a condition which cannot be altered to the individual's benefit with the passage of time. On the contrary, as time goes on, pregnancy can only continue to increase the reasonableness of the differentiating treatment based on sex itself, until, by the third

trimester, at the latest, all participants in the controversy agree that it is proper to treat pregnant women differently than men (and non-pregnant female flight attendants).[2]

Hence, to solve the questions presently before us, we should direct our attention to other cases, in which the physical idiosyncracies associated with a particular race or a particular sex are the very basis for the differentiating treatment.

Our first question, of course, is whether the sex or racial identifying characteristic can ever, in and of itself, be a justifiable, non-discrim-

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[2] Since the result achieved by the majority agrees that such differentiating treatment is also proper for the second trimester, all that may be said about the third trimester would apply with equal force and effect to the second. The scope of my disagreement with the majority is, thus, restricted to the first thirteen weeks of pregnancy.

inatory grounds for according non-identity of treatment. The two cases in which the Supreme Court has addressed the question both have answered in the affirmative. General Electric Co. v. Gilbert, 429 U.S. 125 (1976); Nashville Gas Co. v. Satty, 434 U.S. 136 (1977).[3]

In Gilbert, the employer had a sick leave pay arrangement extending to virtually all kinds of sickness. On the grounds it was not an illness, General Electric did not pay employees who had to go on leave because of pregnancy. In determining whether it constituted discrimination not to pay its pregnant

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[3] Satty, even as in the present case, involved two different employer programs which were under attack: (1) loss of seniority upon pregnancy, and (2) denial of sick leave pay to pregnant employees. The finding of impermissible discrimination, insofar as loss of seniority was concerned, has already been cited and relied on at the outset of this opinion. With respect to the denial of sick leave pay, the Court adhered to Gilbert's conclusion.

female employees the sick leave allowance, the Supreme Court was faced with a quandary of some dimensions. The women could and did argue that, because of the exclusion, men got the benefit in all cases, whereas the women got the benefit for only some, not all of the cases. Yet, if the employer had chosen to pay the benefits to women disabled by pregnancy, the men could have contended with equal logical force, that both categories got only the benefits for heart, liver and other ailments to which both sexes were subject, but women alone also got, while men did not, important and substantial economic benefits associated with pregnancy, and so associated with women only.[4]

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[4] While the argument has less emotional appeal at a time when overcoming past discrimination against women is in the forefront of the minds of most of us,

Footnote continued on following page.

The fact was that there was no way to treat the two categories identically. Up to now, and presumably forever, men cannot become pregnant. So different treatment will inevitably result either way. It is hardly surprising that, faced with a "damned if you do and damned if you don't" situation, the Court concluded that, since the amount paid in women's benefits equalled or exceeded the benefits paid for men, even without including pregnancy as an event giving rise to eligibility for payment, there was no discrimination.

Likewise, in Satty, the Court determined that a denial of benefits to women for pregnancy was facially neutral, so did not create a prima facie case of

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4 Footnote continued from previous page it, nevertheless, as a matter of pure logic has as much or as little validity as the argument advanced by the female employees.

discrimination.[5] Nevertheless, as the Court was careful to point out, if the employees could meet the additional burden of proving pretext, i.e. that the employer really intended to discriminate, and only used the facial neutrality as an excuse, a right to relief would be made out.

So, as in Gilbert and in Satty, we must first determine whether pregnancy makes a difference justifying different treatment in the circumstances of the present case or whether pregnancy is only a difference without making one.

Here we must, except to he extent of the consequences of a conclusion that prima facie discrimination was not made

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[5] "When confronted by a facially neutral plan, whose only fault is underinclusiveness, the burden is on the plaintiff to show that the plan discriminates on the basis of sex in violation of Title VII." (emphasis supplied). 434 U.S. at 144.

out, take our leave of Gilbert and Satty, for the factual materials from this point on have so little similarity as to be of no real assistance in determining whether the facts of the instant case do or do not make out prima facie discrimination. Dealing, as Gilbert and Satty did, with whether leave associated with pregnancy must be compensable to avoid a charge of discrimination is quite different from deciding whether a requirement that a flight attendant immediately stop flying and take leave without pay until termination of and recovery from any after-affects of the pregnancy is discriminatory.

In the first place, there is the added factor of involvement of others than merely the employer and the employee, who alone were concerned in Gilbert and Satty. Outside third parties, namely the

passenger[6], have an interest which cannot be ignored.

Second, pregnancy in Gilbert and Satty was not fragmented into trimesters. No doubt the impact on the issues there before the Court was greatest in the third trimester. Nevertheless, the relevance of the decisions as to whether or not there was discrimination on a prima facie basis in the present case is remote. The relevant test is a different one, as to which an answer must be found without the assistance of decisive or even strongly indicative precedent from the Supreme Court. It is simply whether ". . . the duty resting upon air carriers to perform their services with the high-

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[6] The flight crewmembers also are third parties directly involved. While an argument could be constructed that their interests are bound up in those of the employer, it is really a personal concern of crewmembers, the enhancement of their individual safety, which is engaged.

est possible degree of safety in the public interest . . ."[7] combined with the generally accepted medical evidence spells out a situation in which danger in flight service is significantly enlarged unless disqualification occurs immediately upon the first knowledge of pregnancy. If not, discrimination has been made out. If, on the other hand, a manifest increase in safety risk is demonstrated discrimination is convincingly rebutted. A secondary question arises, if the manifest increase in safety risk is demonstrated, whether the plaintiffs never succeeded in finally establishing prima facie discrimination as part of the plaintiffs' case, or whether, although prima facie discrimination was made out, nevertheless, as an affirmative defense, a showing of busi-

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[7] 49 U.S.C. § 1421(b).

ness necessity or bona fide occupational qualification by the defendant overcame the prima facie case.

The nature of airplane accidents is such that they are, fortunately, extremely infrequent for the scheduled airlines, and, on the other side of the coin, usually so devastating when they do occur that death of everyone is so inevitable and virtually immediate that the physical condition of the flight attendant is not going to matter one way or the other. Nevertheless, there are intermediate situations on which quick and alert reaction by flight attendants in circumstances of great danger and tension may make all the difference. The medical evidence supports a conclusion that a pregnant flight attendant may be somewhat less able to respond in a complete and efficacious manner. The testimony unequivocally establishes that, although, if

healthy, a flight attendant during the first thirteen weeks could perform as effectively as though she were not pregnant, a substantial disability could occur in the event of a miscarriage. Miscarriage is defined as the termination of pregnancy before the twentieth week. Miscarriage is an illness confined to pregnancy, and its occurrence in the first thirteen weeks is frequent enough[8] that the airline here was justified in giving the attention it gave to the increased risk, and in removing pregnant flight attendants from service immedi-

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[8] The overwhelming majority occur in the first thirteen weeks. Approximately 10% of all implanted pregnancies will terminate in miscarriages. Ninety percent of these will occur in the first thirteen weeks. There is no indication that incapacitating miscarriages can be predicted in such a way as to confine grounding of flight attendants to only some and not all who are pregnant. The dangers of miscarriage are real in every pregnancy. Miscarriages beyond the sixth week of pregnancy are usually disabling.

ately on learning of the pregnancy.

The airline charged with the safety of its passengers and crew should be entitled to take the change in the risk factor into account by doing what it reasonably can to preclude any palpable growth in the risk. It should be enough in the way of justification to point to a humanitarian responsibility. However, were it not, there remains the increase in the possibility of huge claims for injury and death occurring because a pregnant flight attendant, even during the first thirteen weeks, was serving the passengers and was handicapped or incapacitated in a crucial manner at a crucial time.

Having so determined, we have, just as the Supreme Court in General Electric Co. v. Gilbert had, a situation where, the facts having been considered, an exclusion based on pregnancy was "not a

gender-based discrimination at all." Id. 429 U.S. at 136.[9] In sum and substance, the gender variation, while it only is a difference prior to pregnancy, made a difference once pregnancy had occurred and the disqualification from flying proceeded, not from sex, but from disability.

That, of course, does not end the matter, for the possibility of pretext still remains. While Nashville Gas Co. v. Satty, 434 U.S. 136 (1977), has held that the denial of sick pay for pregnancy, although facially neutral, may nevertheless be found discriminatory upon proof of pretext on the part of the employer, it is by no means clear that Satty, concerned only with the interests of employer and employee, would extend

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[9] Elsewhere the Court said "the respondents have not made out the requisite showing of gender-based effects." Id. at 137.

to a situation involving responsibility to third parties such as other flight crewmembers and passengers. Assuming that it does, nevertheless, the posture of this case effectively repudiates the existence of pretext. This is so because 90% of Eastern's flight attendants are female, reflecting a strong past practice favoring (men flight attendants could well argue "discriminatorily favoring") women for that position. The physical appearance of flight attendants is not significantly affected during the first thirteen weeks of pregnancy. Thereafter, a majority of the Court is prepared to hold that the airline would not be acting discriminatorily if it discontinued flight service during the continuation of pregnancy in the second and third trimesters.

The airline must go to expense to identify and train flight attendants.

It is not lightly to be supposed that it goes to that expense in an employment area which heavily favors females, only, for no valid reason, to force them off flight duty during the first thirteen weeks. During those thirteen weeks, when pregnancy is not visually evident, knowing that from the thirteenth week on the airline might properly disqualify them for flight service during the pendency of the pregnancy, it strains credulity beyond the reasonable point to hold that it is to be conjectured, assumed or concluded, in the absence of direct evidence, that those responsible for the decisionmaking of the airline were in fact acting pretextually and discriminating on the grounds of a difference uniquely sex-related. No respectable reason has been advanced to find a pretext in a policy which will complicate personnel problems for the airlines, in a position for which

it has traditionally preferred females, whose physical appearance will not be altered, and whose removal from flight service after thirteen weeks is clearly proper and not discriminatory. It would be too farfetched in the face of such considerations to allow an argument of pretext distilled from other, evidently distinguishable cases without such overwhelming countervailing considerations. This is not to say that as an airline executive I should have reached the same conclusion. The careful and detailed opinion of the district judge outlines substantial basis for a belief to the contrary. But it is not incumbent on the airline official to be wise -- only that he or she be non-discriminatory.

With respect to that aspect of the decision, I consequently would reverse the decision of the district judge. I find no sufficient basis for a finding

of discrimination in the first instance or secondarily on the basis of pretext.[10] In this connection, I would point out one advantage of my conclusion. It insures the same result whichever airline and whichever district judges are involved, assuming no other indicators of sexual discrimination are present. It, therefore, avoids the undesirable result which I fear the majority decision will bring about of differing results depending on factfindings in individual cases where the issue really is essentially the same

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[10] It should be emphasized that there is no occasion, on the facts of the case, to explore whether we have a situation where prima facie discrimination was not, in the end, made out or whether the defendant successfully met the burden of rebutting on the grounds of business necessity or bona fide occupational qualification a prima facie case established by the plaintiffs. The facts on which I rely to demonstrate a safety problem of significant proportions, which cannot be confined in advance to only some of the cases of pregnancy are not in dispute.

throughout the industry. Cases favoring Eastern by deciding that the immediate unpaid leave requirement effective upon the first knowledge of pregnancy was valid are:

1. Harriss v. Pan American World Airways, 437 F. Supp. 413 (N.D. Calif. 1977);

2. EEOC v. Delta Air Lines, Inc., 441 F. Supp. 626 (S.D. Tex. 1977), reversed and remanded on purely procedural grounds, ___ F.2d _____ (5th Cir. 1980);

3. Air Line Pilots Ass'n v. Western Air Lines, Inc., 22 E.P.D. ¶ 30,636 (N.D. Calif. 1979);

4. Condit v. United Airlines, Inc., 12 E.P.D. ¶ 11,195 (E.D. Va. 1975), affirmed as not clearly erroneous, 558 F.2d 1176 (4th Cir. 1977), cert. denied, 435 U.S. 934 (1978).

Cases going the other way are:

1. McLennan v. American Airlines, Inc., 440 F. Supp. 466 (E.D. Va. 1977);

2. In re National Airlines, Inc., 434 F. Supp. 249 (S.D. Fla. 1977);

3. The case under current consideration, Burwell v. Eastern Airlines, Inc., 458 F. Supp. 474 (E.D. Va. 1978).

Nor is the argument persuasive that the rule requiring discontinuation of flight service even in the first thirteen weeks because of pregnancy should be deemed discriminatory because of widespread failure of flight attendants to honor the rule. The argument runs that the rule unfairly discriminates against the forthright and honest, in favor of the dissimulative and dishonest employees who violate a company rule and conceal

existence of pregnancy. The short answer is that Title VII does not exist to create protected rights in dishonest employees. Absent a showing that Eastern connived in or winked at the failure to report, and none is shown to have existed in this case,[11] that should not be a grounds for invalidating an otherwise reasonable rule.

In short, it was a facially neutral treatment of a difference between men and women created by another force than human beings, and apparently immutable, which has an adverse impact on flight safety.

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[11] Nothing suggests that Eastern ignored knowledge of pregnancy and permitted the pregnant flight attendant to continue to fly. At most the plaintiffs develop from their evidence that Eastern could more effectively have ferreted out pregnant flight attendants. But that is well short of knowing disregard of the rule, which would support a finding of pretext. At most, carelessness has been made out, and that does not amount to bad faith or evil motive.

There is no justification for pursuing a pretext claim, wholly rebutted by other evidence in the case. To the extent of the holding that mandatory discontinuation of flight service is discriminatory when enforced in the first trimester I would reverse. Judge Russell and Judge Widener have authorized me to say that they concur in my dissent.

WIDENER, Circuit Judge, concurring and dissenting:

Although I concur completely in Judge Murnaghan's separate opinion, a few additional words are, with respect, in order in light of what the majority finds, or fails to find, in the record regarding the effect of pregnancy during the first thirteen weeks.

The majority's treatment of the first thirteen weeks of pregnancy (Part II of Judge Sprouse's opinion) is based on the similar premises that the experts "point to the virtual unanimous conclusion that a pregnant flight attendant can adequately perform routine and emergency duties through the thirteenth week of pregnancy." slip opinion, p. 12, and that "there is no credible evidence supporting Eastern's contention that pregnancy during the first thirteen weeks is a factor that might affect the safety of its

passenger operation." Slip opinion, p. 27. I believe both of them are demonstrably unsupported by the record.

Even a hurried reference to the appendix shows an unrefuted example of an actual occurrence which supports my view. On an Eastern flight from Boston to Washington with a stop at Lexington, one stewardess had to work the trip by herself because the other stewardess, in her first trimester, was incapacitated by morning sickness. If the Captain had known about it, he would have had to cancel the trip in order to comply with FAA requirements. FAA requirements were violated by flying the trip with only one stewardess able to perform her duties. (App. 1272, 1282).

An equally obvious example is the testimony of Dr. William Cooper whose specialty is obstetrics and gynecology.

Dr. Cooper has been a practicing physician since 1953 and is a licensed pilot. He has delivered somewhere between 7,000 and 10,000 babies and has seen many more patients than that.

Dr. Cooper testified in small part as follows:

> "Q. Can women ordinarily predict when they will be affected by morning sickness?
>
> A. No. I don't believe they can predict it at all, Ms. Perdue. It can happen at any time. Come out of the blue just like that; no warning.
>
> Sometimes they will even notice a projectile vomiting and difficulty getting to the bathroom in order to not mess things up.
>
> It is not predictable.
>
> Q. Are dizziness and fainting sometimes common the first trimester?
>
> A. Very common."
>
> (App. 1134)
>
> * * * * *
>
> Q. It is possible to predict when a pregnant woman will faint or which

women will suffer from this?

A. It is not possible to predict which women will suffer from it.

It is possible, otherwise, to say, stay out of a closed-in environment, a hot environment; stay out of a situation where this might occur.

An when you have finished eating dinner, stand up slowly; don't get out of bed rapidly in the morning, and so forth.

Q. In you opinion, would this tendency to faint or dizziness be aggravated by motion?

A. Yes, I think it would.

Once again, the body has to adjust to another irritant or something occurring to the body's environment.

(App. 1136)

* * * * *

Q. Do you believe it [permitting pregnant flight attendants to work on aircraft] would compromise the safety of passengers and other crew members on the aircraft?

A. I do.

(App. 1175)

The nine physicians who comprised the Air Transport Association Medical and

Sanitation Committee recommended by a 8 to 1 vote that flight attendants should be taken off flight status as soon as they are aware of pregnancy. (App. 1266).

The above uncontradicted incident, the brief excerpt from the testimony of Dr. Cooper, and the unrefuted recommendation of eight of the nine physicians comprising the Air Transport Association Medical and Sanitation Committee show, I submit, beyond doubt that the position of the majority that there is a "virtual unanimous conclusion that a pregnant flight attendant can adequately perform routine and emergency duties through the thirteenth week of pregnancy," and its similar position that "there is no credible evidence supporting Eastern's contention that pregnancy during the first thirteen weeks is a factor that might affect the safety of its passenger operation" are not supported by the record.

To simply dismiss as incredible the evidence of the physician who testified contrary to the findings of the majority is not a sufficient answer. I suggest that it may be explained by the fact that neither the opinion of the district court nor either of our opinions (Judge Sprouse and Judge Butzner) which make up a majority permitting pregnant stewardesses to fly during the first thirteen weeks, even mentions the statutory standard which is deeply involved in this case, which is, of course, 49 U.S.C. § 1421(b). That statute requires in terms that the FAA administrator shall give full consideration to "the duty resting upon air carriers to perform their service with the highest possible degree of safety."

A stewardess who is vomiting in the lavatory cannot participate effectively in an emergency evacuation. Neither can one who is fainting or miscarrying. If

for no other reason than because the record will support only the conclusion that fainting and vomiting cannot be predicted, it is simply not possible to operate an aircraft with the "highest possible degree of safety" with a stewardess flying who may well be incapacitated just when she is needed most. I suggest that the absence of any mention of the statutory requirement in the opinion of the district court and the two majority opinions of this court is due to the fact that there is no answer to it. But the question must be answered before liability may be established. A finding of liability with no answer given, or even attempted, to what is obviously one of the key questions in the case, is, I submit, unjustified.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION *

| | | |
|---|---|---|
| CATHERINE M. BURWELL, et al., | ) | |
| Plaintiffs, | ) | |
| v. | ) | Civil Action No. 74-0418-R |
| EASTERN AIR LINES, INC., et al., | ) | |
| Defendants. | ) | |
| --AND-- | | |
| SHARYN D. CLAYTON, | ) | |
| Plaintiff, | ) | |
| v. | ) | Civil Action No. 75-0688-R |
| EASTERN AIR LINES, INC., | ) | |
| Defendant. | ) | |

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*Petitioners have reprinted the opinion of the United States District Court for the Eastern District of Virginia Richmond Division as originally circulated by that court.

MEMORANDUM

Plaintiffs, female employees of the defendant, Eastern Air Lines, Inc. (Eastern), bring this action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., to redress alleged sexually discriminatory employment practices. Local 550 of the Airline Stewards and Stewardesses Association (local 550) and Local 553 of the Transport Workers Union of America (TWU Local 553) are also named as defendants. The plaintiffs seek declaratory, injunctive and monetary relief. Jurisdiction is attained pursuant to 42 U.S.C. § 2000e-5(f). A trial has been held on the issue of liability and the Court is prepared to issue its findings of fact and conclusions of law.

## I. FINDINGS OF FACT

### A. Parties

(1) The action styled Burwell, et al. v. Eastern Air Lines, Inc., at al. was brought by Catherine Burwell and Jean Proctor against Eastern and the two union defendants alleging sex discrimination in the maintenance and administration of the maternity and benefits policies applicable to Eastern flight attendants.

(2) Sharyn Clayton filed a similar action against Eastern in the United States District Court for the Northern District of Alabama.

(3) Plaintiff Burwell, who has been an Eastern flight attendant for approximately twelve years, had had the following maternity history since 1970:

(a) Burwell notified Eastern May 13, 1970 that she was pregnant. She gave birth on October 7, 1970.

(b) Burwell again became pregnant in late 1974. That pregnancy terminated in a miscarriage in November,

1974.

(c) On April 8, 1976, Burwell again advised Eastern that she was pregnant. Her expected delivery date was mid-August, 1976.

(4) Plaintiff Proctor, who has been an Eastern flight attendant for approximately eleven years, has had the following maternity history since 1970:

(a) Proctor notified Eastern approximately May 15, 1972 that she was pregnant. She gave birth on September 21, 1972.

(b) Proctor notified Eastern approximately September 3, 1974 that she was again pregnant. She gave birth on January 28, 1975.

(5) The defendant Eastern is a Delaware corporation doing business in Virginia where it is engaged in the transportation of passengers across state lines. Eastern employs more than fifteen

persons and has, at all times material to this action, been an employer engaged in an industry affecting commerce within the meaning of 42 U.S.C. § 2000e-(b), (g) and (h).

(6) Locals 550 and 553 (the Union) are labor organizations engaged in an industry affecting commerce and having more than fifteen members within the meaning of 42 U.S.C. § 2000e-(d) and (e). At all times material hereto prior to June 1974, Local 550 was the recognized collective bargaining representative for all Eastern flight attendants. In June 1974, Local 553 was formed as a successor to Local 550 with respect to the employees of Eastern. Since June 1974, Local 553 has been the recognized collective bargaining representative for all Eastern flight attendants.

(7) The plaintiffs are and have been members of the Union at all times

material to this litigation.

B. The Issues

(8) At issue in this litigation is the legality of the various components of Eastern's maternity policy. Broadly speaking, the plaintiffs challenge: (a) the separate treatment of pregnancy under Eastern's Group Comprehensive Medical Insurance; (b) the exclusion of pregnancy from Eastern's paid sick leave policy and the impact of such exclusion on other conditions of employment; (c) the policy that pregnant flight attendants lose all accumulated seniority if they transfer to ground positions rather than taking maternity leave; (d) the time limits placed on guaranteed rights to reinstatement of flight attendants taking maternity leave and (e) the requirement that flight attendants must commence maternity leave immediately upon knowledge of pregnancy. The policies under

attack are contained in a collective bargaining agreement entered into by Eastern and the Union.

C. Class Action

(9) Upon motion of Eastern, the Clayton action was transferred from the Northern District of Alabama to the Eastern District of Virginia. The Burwell and Clayton actions were consolidated for all purposes by order of the Court dated January 27, 1976.

(10) Upon motion of Eastern, this litigation was certified a class action pursuant to Rule 23(b)(2), Fed. R. Civ. P. The class is defined as all female flight attendants employed by Eastern at any time since October 27, 1972, or who may be so employed in the future, and who are, were, or may in the future be subject to Eastern's maternity leave policy.

(11) Notices of the pendency of this action were mailed to all class members

on November 10, 1975 and January 29, 1976. In addition, notices were posted for a period of twenty days at all places throughout the Eastern system where flight attendant notices are customarily posted.

(12) The plaintiffs have now moved the Court (a) to redefine the class to include ground employees and (b) to extend the time frame back to July 2, 1965. The Court would be inclined to include ground employees and to adopt a July 2, 1965 cutoff date if the request for class certification were being presented for the first time. See Briggs v. Brown and Williamson Tobacco Corp., 414 F. Supp. 371, 377-378 (E.D. Va. 1976). At this late date, however, broadening the class in the requested manner would, in the Court's view, be inappropriate.

D. History of Eastern's Maternity Related Policies

(13) Prior to 1973, Eastern refused to hire married persons for flight attendant positions. Between 1958 or 1959 and 1973, Eastern also limited employment of flight attendants exclusively to women. Accordingly, the impact of the "singles only" hiring policy fell primarily upon women. Prior to the mid-1960's, Eastern also maintained a policy of terminating female flight attendants who became married. This policy was never applied to male flight attendants.

(14) From 1931 until May 1, 1965, Eastern automatically terminated all flight attendants who became pregnant. This policy was modified in 1965 to give the Company the option to fire flight attendants who became pregnant. From March 21, 1970 to the present, Eastern's policy has been that flight attendants must commence unpaid maternity leave immediately upon knowledge of pregnancy.

As part of this policy, flight attendants on mandatory maternity leave have guaranteed rights to reinstatement within ninety days after delivery under normal circumstances or within six months after delivery if the additional time is needed for medical reasons.

(15) From March 21, 1970 until April 26, 1973, it was Eastern's policy that flight attendants could not accrue seniority during mandatory maternity leave. As a result of collective bargaining between Eastern and the defendant Union, this policy was changed to allow accrual of seniority. Flight attendants whose seniority dates were adversely adjusted as a result of maternity leave occurring after July 1, 1972, could, upon request, have such seniority restored.

(16) On April 12, 1974, in connection with the settlement of Healen v. Eastern Air Lines, Inc., Civil Action No.

1897 (N.D. Ga.), Eastern agreed to restore the seniority of any female flight attendant whose seniority had been adversely affected as a result of maternity leave occurring prior to July 1, 1972. At Atlanta, and perhaps at other bases, attendants who were identified as having taken maternity leave prior to July 1, 1972, were sent individual letters setting forth the facts of the Healen settlement and requesting that they respond in writing within sixty days, stating their name, employee number and dates of maternity leave. Eastern subsequently automatically restored all seniority for flight attendants at its Atlanta base, whether or not they responded to the individual letters explaining Healen.

(17) Although plaintiff Proctor did not accrue seniority during her maternity leave in 1972, and did not request restor-

ation of seniority under either the 1973 contract change or the Healen settlement, Eastern nonetheless restored her seniority sometime between January 1, 1974 and July 1, 1974. Mrs. Proctor lost no seniority during her 1974-1975 maternity leave.

E. Medical Insurance Plan

(18) Eastern provides a Group Comprehensive Medical Insurance Plan for eligible flight attendants and pays 100% of the premiums for such coverage.

(19) Eastern's Group Comprehensive Medical Insurance Plan has provided at all relevant times herein the payment of 80% of all covered major medical expenses after the satisfaction of a $100 per person calendar year deductible.

(20) Eastern's Group Comprehensive Medical Insurance Plan provided and continues to provide for the payment of covered in-hospital expenses at the fol-

lowing rates: For March 21, 1970, through June 30, 1973 -- payment of the first $750 plus 80% of all additional covered expenses; from July 1, 1973, through July 31, 1974 -- payment of the first $1,200 plus 80% of all additional covered expenses; from August 1, 1974, through the present -- payment of the first $1,500 plus 80% of all additional covered expenses.

(21) Under its medical insurance plan effective February 4, 1976, Eastern provides benefits for pregnancy expenses as follows: for normal deliveries, the plan will reimburse the first $300.00 of covered expenses, the employee will pay the next $300.00, and then 50% of all covered expenses over $600.00 will be reimbursed by the plan. For miscarriages and abortions, the plan will reimburse the first $200.00 of covered expenses, the employee will pay the next $200, and

then 50% of all covered expenses over $400.00 will be reimbursed by the plan. Although the cost of a normal pregnancy will vary in different parts of the country, the average pregnancy at the present time costs approximately $1,000.00.

(22) From approximately 1968 until February 4, 1976, Eastern's Group Comprehensive Medical Insurance Plan provided benefits for pregnancy expenses (hospital and obstetrical) as follows: normal delivery -- up to a maximum of $250.00; miscarriage or abortion --up to a maximum of $150.00.

(23) Eastern's Group Comprehensive Medical Insurance Plan provides the following limitations on coverage:

(a) Payments for out-patient treatment of mental and nervous disorders limited to 50% of covered expense or $10 per visit, whichever is less, with a maximum of 50 visits

per year and $50,000 lifetime;

(b) No payments for services or supplies in connection with routine physical examinations or not reasonably necessary for the medical care of the patient's sickness or injury;

(c) No payment for services or supplies resulting from an occupational injury or illness for which Workmen's Compensation benefits will be available;

(d) No payment for services or supplies furnished by or for any government;

(e) No payment for services or supplies received as a result of an act of war;

(f) No payment for cosmetic surgery unless for an accident suffered while covered;

(g) No payment for examinations to determine need for adjustment of

glasses or hearing aid;

(h) No payment for treatment of periodontal or periapical disease or any condition involving teeth except treatment for a fractured jaw or for an accidental injury to natural teeth;

(i) No payment for treatment of weak, strained, flat, unstable or unbalanced feet, or for metatarsalgia or bunions except open cutting operations, or for corns, calluses, or toenails unless prescribed by a physician;

(j) No payment for nursing, speech therapy, or physiotherapy rendered by the employee or by the spouse, child, brother, sister or parent of an employee or an employee's spouse;

(k) No payment for anything not prescribed or ordered by a physician;

(l) No payment for vaccinations or

innoculations for flu, polio, small-pox, diptheria, etc.;

(m) No payment for eyeglasses or orthopedic shoes;

(n) No payment for the difference between a semi-private room rate and a private room rate;

(o) No payment for charges that are not reasonable, customary, necessary and prescribed by a physician for treatment of any non-occupational injury or illness;

(p) Payment for hospital room and board charges during the first seven (7) days after birth of children of covered employees; and

(q) Payment for up to 80% of the reasonable and customary fee for required surgery.

(24) At all times material to this litigation, Eastern's medical benefits plan has provided major medical benefits

for the following complications of pregnancy: Hyperemsis Gravidarum (pernicious vomiting); eclampsia of pregnancy (toxemia with convulsions); Caesarean sections after six months of pregnancy; intra-abdominal surgery after pregnancy terminates; and surgery for extra-uterine pregnancy. Such benefits are equivalent to those for any other covered illness or injury.

(25) As of June 1974, Eastern estimated that it would cost an additional $5.72 per flight attendant per month, or $68.84 per flight attendant per year, to provide medical benefits for normal pregnancies on the same basis as regular medical benefits. The cost of the 1976 increase in benefits for miscarriages, abortions and normal deliveries was estimated to be $67,000 per year for flight attendants alone and $448,100 for all Eastern employees who received similar

increases.

(26) Women comprise approximately 90% of the flight attendant group, and receive about 95% of the benefits paid out under the medical insurance plan.

F. Sick Leave, Maternity Leave and Disability

(27) Eastern's employment benefits package is the product of negotiations between Eastern and the Union. The various policies are contained in the collective bargaining agreement. For the purposes of determining the eligibility for and extent of the various benefits, a distinction is made between active employees, i.e., those on the payroll, and inactive employees, i.e., those not on the payroll. Active employees include those actually working, those on paid sick leave, and those on vacation. Inactive employees include those on medical leave without pay (including short term

and long term disability), those on personal or emergency leave, those on military leave, and those on maternity leave. In most material respects, the benefits afforded inactive flight attendants are equivalent to those afforded active flight attendants. In this litigation, the relevant comparison involves the benefits available to flight attendants on paid sick leave and those afforded flight attendants on maternity leave.

(28) Under the collective bargaining agreement, a flight attendant who is unable to make a scheduled flight because of an illness or injury is placed on sick leave. Flight attendants placed on sick leave continue to receive their base pay to the extent of accrued sick leave allowance and are considered active employees.

(29) Sick leave allowance is accrued as follows: From October 9, 1967 through

April 26, 1973, flight attendants accrued sick leave at a rate of 1 1/6 days per month of active service to a maximum of 120 days accrued sick leave. Although flight attendants were not eligible for sick leave benefits during the first three months of active service, they accrued sick leave credit during that period. From April 26, 1973, until December 31, 1974, flight attendants accrued sick leave allowance at a rate of 2 hours per month during the first 6 months of active service. After six months of active service, flight attendants accrued sick leave allowance at the rate of 4 1/2 hours per month for each month of active service up to a maximum of 400 hours. Effective January 1, 1975, flight attendants accrued sick leave allowance at the rate of 4 1/2 hours per month for each month of active service to a maximum of 500 hours.

(30) Flight attendants who accumulate 300 or more hours of sick leave credit and become sick, will, upon return to active duty, accumulate sick leave credits at the rate of 5 1/2 hours per month rather than 4 1/2 hours per month until their sick leave bank again equals the sick leave credits accrued when their sick leave began.

(31) Flight attendants on paid sick leave continue to accrue sick leave and vacation credits at the same rate that they would if on active employment. Flight attendants on maternity leave, however, accrue neither sick leave nor vacation leave.

(32) When plaintiff Burwell commenced her maternity leave on May 14, 1970, she had accrued 47 and 5/6 days of sick leave. Plaintiff Proctor had accrued 140 hours and 54 minutes of sick leave prior to the commencement of her

maternity leave on May 15, 1972, and had accrued 58 hours and 55 minutes of sick leave when she began her maternity leave on September 3, 1974. Neither woman was permitted to apply her earned sick leave credits to her maternity leave.

(33) Eastern does not allow flight attendants to apply sick leave credits to leaves caused by the following conditions: (a) alcoholism or drinking problems; (b) drug addiction or drug problems; (c) intentionally self-inflicted injury or attempted suicide; (d) pregnancy; (e) cosmetic surgery or elective plastic surgery; or (f) routine physical examinations or doctor's appointments, unless the flight attendant can show that it is impossible to schedule appointments during non-working hours.

(34) Eastern allows the use of sick leave by flight attendants for the following conditions, among others: lung

cancer, sterilization, hernia, psychiatric care, injury incurred in a sports activity, prostatitis or prostatectomy, injury incurred in an automobile accident, and vasectomy.

(35) While on paid sick leave, Eastern flight attendants may continue their Group Comprehensive Medical Insurance for the duration of their paid sick leave, and the company continues to pay 100% of the premium payments. Flight attendants on maternity leave (or other leave without pay) may continue coverage of the Group Comprehensive Medical Insurance Plan only by personally paying the required monthly contribution.

(36) Since 1961 or earlier, it has been Eastern's policy to provide, at no cost to employees, an accident and sickness plan for flight attendants who are unable to work because of non-occupational accident or sickness. Benefits under

this sickness and accident plan range from $25.00 to $110.00 per week and are payable from the eighth day of disability or from the expiration of accumulated sick leave benefits, whichever is later, up to a maximum of 26 weeks for each disability period.

(37) Eastern has offered long-term disability insurance coverage to flight attendants since 1973. Coverage under the long-term disability plan is elective, and the premium costs are borne by the individual flight attendant.

(38) Flight attendants who take sick leave due to an injury or illness are eligible for paid sick leave only to the extent accrued. After exhaustion of paid sick leave, flight attendants are eligible for short-term accident and sickness benefits. They may then be eligible for long-term disability benefits under the elective plan, but only after exhaustion

of the short-term plan and a six-month waiting period.

(39) Flight attendants who are on maternity leave of absence are not eligible for short-term disability plan benefits or long-term disability plan benefits.

(40) The short-term disability coverage plan excludes the following conditions: (a) injuries covered by workmen's compensation or similar legislation; (b) conditions for which the employee is not under regular care of a physician; and (c) pregnancy or its complications.

(41) The long-term disability plan excludes the following conditions: (a) intentional self-inflicted injury whether sane or insane; (b) injuries resulting from war or act of war; (c) willful misconduct or commission of a felony; (d) alcoholism unless the employee is hos-

pitalized for rehabilitation; (e) drug addiction unless the employee is hospitalized for rehabilitation; (f) pregnancy, child birth, or complications thereof; (g) injuries incurred while serving in the armed forces of this country or another country; (h) participation in a riot; and (i) injuries or sicknesses not being treated by a qualified physician.

(42) Leaves of absence for sickness or injury may extend for a maximum continuous period of three years. It has been Eastern's policy since March 21, 1970 that flight attendants on maternity leave must be available to return to service within ninety days following delivery unless additional time, not to exceed six months, is medically necessary.

(43) Seniority is defined in the collective bargaining agreement as the length of service with Eastern. Accrual

of seniority is not dependent upon availability for flight duty. Seniority affects flight attendants regarding: (a) reductions in force; (b) recalls after furlough; (c) assignment or reassignment to bases; and (d) flying assignments within the bases.

(44) Active service is defined in the collective bargaining agreement as the time during which a flight attendant is available for flight duty, not including time on leave of absence in excess of thirty days, but including time on sick leave and vacation. The active service date is used for the following purposes: (a) to establish flight attendant seniority members; (b) to determine pay progression dates; (c) to determine vacation accrual; (d) to determine sick leave accrual; and (e) service awards.

(45) Flight attendants taking maternity leave retain active service credit

throughout the leave and accrue active service for the first thirty days of leave. Flight attendants on paid sick leave continue to accrue active service for the duration of the paid sick leave.

(46) Plaintiff Proctor's active service date was adjusted 197 days on December 4, 1972 as a consequence of her maternity leave from May 15, 1972 through November 26, 1972. Her active service date was adjusted 237 days on May 5, 1975 as a consequence of her maternity leave from September 3, 1974 through April 28, 1975. Plaintiff Burwell's active service date was adjusted 230 days on December 31, 1970 as a consequence of her maternity leave from May 13, 1970 through December 28, 1970.

(47) As discussed previously, Eastern in the past did not allow flight attendants to accrue seniority while on maternity leave. This policy was changed through

collective bargaining and the settlement of a lawsuit, and is not in issue here.

(48) It is Eastern's policy to provide employees on active status with pleasure travel privileges on Eastern flights (and other airlines with whom Eastern has reciprocal arrangements). These privileges are granted on a space-available basis subject to certain restrictions and payment of a service charge.

(49) Employees on paid sick leave or on vacation are considered "active employees," and hence are entitled to travel passes. Employees on maternity leave are not considered active employees and, accordingly, are ineligible for travel passes.

(50) It is the policy of Eastern to compel flight attendants to commence maternity leave immediately upon knowledge of pregnancy. Because of this

policy, Eastern does not provide flight attendants with maternity uniforms for in-flight use and makes no allowances for weight gain due to pregnancy in administering its personal appearance policy.

(51) The collective bargaining agreement contains a provision by which a flight attendant forfeits all seniority rights accrued as a flight attendant should he or she transfer to a position not directly related to flight attendant work. An exception is made for transfers caused by physical incapacity, sickness or injury, but pregnancy has not been deemed to fall within this exception. This policy makes temporary transfers to ground positions highly impractical and undesirable for most flight attendants on maternity leave.

G. Basis for the Maternity Program

(52) Eastern offers the following reasons for excluding pregnancy from sick

leave and disability plans and for distinguishing between pregnancy and other physical conditions under the insurance plans:

(a) Pregnancy is neither an illness nor an injury within the categories of risk which the insurance and sick leave plans were intended to cover;

(b) There is an element of voluntarism involved in pregnancy which does not apply in the same degree to other temporarily disabling physical conditions;

(c) The limits placed on maternity benefits reflect a rational economic decision of the Company and the female-dominated Union on how best to allocate limited resources. Increased maternity benefits have not been necessitated by Union pressure or by competition within the airline industry;

(d) Payment of sick leave or disability benefits for pregnancy would

amount to a form of severence pay not available to men or non-pregnant females because a significantly higher percentage of flight attendants fail to return from maternity leave than from medical leave; and

(e) The cost of providing sick pay and short-term disability for pregnant flight attendants and other pregnant Eastern employees would be excessive.

H. Mandatory Maternity Leave

(53) From March 21, 1970 until the present, Eastern has maintained a policy of requiring flight attendants to commence unpaid maternity leave immediately upon learning that they are pregnant. The flight attendant has a guaranteed right of reinstatement within ninety days after delivery or, if additional leave time is warranted by the flight attendant's medical condition, within six months after delivery.

(54) Maternity leave is the only form of mandatory leave without pay.

(55) Pregnancy is the only physical condition which automatically precludes a flight attendant from flying. Effective December 4, 1975, flight attendants with diabetes controlled by insulin and certain epileptic flight attendants, have been permitted to fly despite evidence that such flight attendants are more likely to be rendered unable to perform their duties than pregnant flight attendants.

(56) Eastern has never conducted or caused to be conducted any study or analysis regarding the effects of pregnancy upon a flight attendant or her ability to satisfactorily perform her duties. Prior to the inception of this litigation, Eastern has never sought or received any professional or expert opinion concerning the ability of a

pregnant flight attendant to continue her work.

(57) The evidence clearly establishes that Eastern makes virtually no effort to police its forced maternity leave policy. Eastern relies upon the individual flight attendant to advise the company of pregnancy. Other than voluntary compliance, visual detection is the only means by which Eastern attempts to enforce its policy.

(58) Eastern has no specific guidelines concerning the physical ability of a flight attendant to function in his or her job. No oral or written instructions are provided in the course of a flight attendant's training regarding physical conditions which should cause a flight attendant not to fly. There are no procedures for regular medical check-ups or examinations of flight attendants. In short, the judgment as to whether a

flight attendant is sufficiently healthy to fly is left almost entirely to the good sense of the individual flight attendant. The record is devoid of any evidence indicating that pregnant flight attendants do not voluntarily abstain from work when physically unable to perform their duties.

(59) Although it is Eastern's position that pregnant flight attendants constitute a safety liability at any stage of pregnancy, most women do not discover that they are pregnant until at least seven weeks after conception, and many women do not discover that they are pregnant until the tenth week of pregnancy. Even assuming voluntary compliance with the policy, therefore, many women would continue to work as flight attendants during part of the period in which Eastern contends their condition poses a safety risk.

(60) It is common knowledge among Eastern's management that most flight attendants continue to work after they become aware of their pregnancy. Most flight attendants continue to work through at least the first trimester of pregnancy. Many, including the named plaintiffs, have continued flying through their fifth month of pregnancy. One flight attendant was seven months pregnant prior to commencing maternity leave.

(61) Surveys conducted by Trans World Airlines (TWA) and Western Airlines also indicate that flight attendants continue flying well into pregnancy. One court has found that flight attendants for National Airlines, on the average, continue to fly through the first three months of pregnancy, and that many fly well into their fifth month. In re National Airlines, Inc., Maternity Leave

Practices and Flight Attendant Weight Program Litigation, 434 F. Supp. 249, 258 (S.D. Fla. 1977).

(62) Eastern has never disciplined a flight attendant who continued flying after knowledge of pregnancy. Indeed, Eastern has never even attempted to determine whether a flight attendant violated its rule, even though such a determination could be readily accomplished, in most cases, by comparing the commencement date of maternity leave with the date of delivery.

(63) The Court has considered the testimony of several experts concerning pregnancy and its impact upon a flight attendant's ability to perform both normal and emergency duties. The depositions of Dr. Earl T. Carter, Director of the Preventive Medicine Section of the Mayo Clinic, and Dr. David Decker, Director of Obstetrics and Gynecology for the

Mayo Clinic, were offered as evidence. Dr. Carter is an expert in the field of aviation medicine and serves as a medical advisor to Northwest Airlines. Dr. Decker is an expert in obstetrics and gynecology.

(64) Dr. Andre E. Hellegars testified as an expert witness for the plaintiffs in the fields of obstetrics and gynecology. Dr. William Whaley provided expert testimony concerning hematology and aerospace medicine.[1]

(65) It was the consensus view of these experts that pregnancy, in a vast majority of instances, is an entirely healthy condition which becomes disabling only near the commencement of labor. The usual duration of such disability is

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[1] Although Dr. Whaley was not offered as an expert in the field of obstetrics and gynecology, the Court notes that he has published several articles in this field as it relates to hematology.

approximately six to eight weeks. It is common medical practice to permit an expectant mother experiencing no complications to continue pursuing all of her normal activities, including her work, until shortly before the commencement of labor. The American College of Obstetricians and Gynecologists endorses this view. All of the obstetricians and gynecologists who testified in this case permit their patients, absent complications, to continue horseback riding, skiing and other vigorous sports during pregnancy. Thus, it is the generally accepted medical practice to allow pregnant women to continue normal working schedules until shortly before delivery provided they are not exposed to noxious elements such as intense radiation or dangerous chemicals. Indeed, Dr. Hellegars considered the loss of income and related stress which accompany an involuntary maternity leave

to be a greater health risk to pregnant women in most instances than continued employment.

(66) Eastern's involuntary maternity leave policy obviously conflicts sharply with the generally accepted medical practice described above. Eastern maintains that the physiological changes associated with pregnancy coupled with the unique work environment of an aircraft cabin impair a pregnant flight attendant in satisfactorily discharging her responsibilities. Specifically, Eastern maintains that continued flying during pregnancy: (a) poses a danger to the fetus; (b) poses a danger to the pregnant flight attendant; and (c) compromises the safe operation of the aircraft because a pregnant flight attendant, in Eastern's view, is less able than her non-pregnant counterpart to perform her normal operational and emergency duties.

(67) The Federal Aviation Administration (FAA), which promulgates extensive safety regulations applicable to commercial airlines, does not require mandatory maternity leave for pregnant flight attendants.

(68) The Air Transport Association (ATA), an association of scheduled air carriers, including Eastern, organized a Medical Committee which is composed of medical directors of member airlines. The ATA Medical Committee is on record as favoring an involuntary maternity leave policy such as Eastern's. The Committee has recognized, however, that this position derives no support from existing medical statistics. Nevertheless, all ATA members, with the exception of Northwest Airlines, have adopted policies similar to Eastern's.[2]

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Footnote appears on following page.

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2 A substantial evidentiary problem arose following trial concerning a document which plaintiffs referred to as the "destroy after reading" memorandum, so designated because those words are written on it. This document, authored by Mr. W. R. Arnold of the Airline's Industrial Relations ("AIR") Conference, purports to summarize the positions of the medical directors of a number of airlines, including Dr. Serrano of Eastern, regarding the ability of flight attendants to perform their assigned in-flight tasks during various stages of pregnancy. The memorandum is based on a report given by Dr. L. G. Lederar, Medical Director of American Air Lines, at a January 6, 1975 meeting of the AIR Conference and Air Transport Association ("ATA") "Task Force on Maternity Problems Involving Cabin Attendants." The portion of the "destroy after reading" memorandum purporting to summarize Eastern's medical position is characterized by counsel for Plaintiffs as contradicting Eastern's official policy regarding mandatory maternity leave. Plaintiffs have offered the document as an admission by a party-opponent under Rule 801(d)(2)(c) of the Federal Rules of Evidence, and Eastern has objected.

The Court is of the view that Eastern's objection is well taken. Despite plaintiffs' exhaustive post trial discovery, plaintiffs were never able to connect the "destroy after reading" memorandum to Eastern sufficiently to bring it within Rule 801(d)

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(2)(c). The position attributed by Mr. Arnold to Eastern was not based on any statement by any employee of Eastern; it was based only on Dr. Lederar's report at the ATA Task Force meeting. Dr. Lederar's report, in turn, was not premised on any written statement of Eastern's position, and did not purport to quote anyone at Eastern. Dr. Lederar's understanding of Eastern's position was no more than an "implication" which he gleened from various conversations with unspecified Eastern representatives at unspecified times and places. Even assuming that these earlier conversations were with Dr. Serrano, who was fully authorized to speak for Eastern, the chain from Dr. Serrano through Dr. Lederar to Mr. Arnold's memorandum suffers too many weak links to satisfy Rule 801(d)(2)(c). Plaintiffs' contention that Kinsgley v. Baker/Beech-Nut Corp., 546 F.2d 1136, 1140-41, (5th Cir. 1977), supports their position is in the Court's view inaccurate, for in that case an overheard telephone conversation was held admissible under 801(d)(2)(c) only because the Court found the connection between the admission made and the person testifying to it to be immediate and direct.

Certain portions of the "destroy after reading" memorandum referring to airlines other than Eastern appear to be better documented, but in the Court's view are merely cumulative of other evidence adduced at trial, and will not be admitted.

(69) Pregnancy generates physiological changes in a woman's body and produces certain side effects which, Eastern maintains, impair her functioning as a flight attendant. Two dramatic changes are an increase in blood volume and an increase in cardiac output. The blood volume of an expectant mother can increase by as much as 40-45%. Simultaneously, the percentage of red cells per unit of blood decreases. The resulting decrease of hemoglobin concentration is termed physiological anemia and is a normal condition in pregnant women; it means that greater amounts of oxygen exist in the blood, but in a less concentrated form. Cardiac output also increases during pregnancy. The combination of these factors means that more blood and oxygen are available for the body's organs

at any given time than are available to a non-pregnant person.

(70) A pregnant woman also experiences an expansion in her abdominal area, a loosening of the pelvic joints, and increased girth. The rate at which the fetus and uterus grow is basically exponential, increasing most rapidly during the later stages of pregnancy. Prior to the twentieth week of pregnancy, these changes have little or no affect on a woman. The rate of growth after the twentieth week varies from woman to woman. The combination of abdominal expansion and increased girth decreases a woman's agility. Consequently, many women become more accident-prone during the later stages of pregnancy. By the end of the twenty-eighth week, these physiological changes significantly affect the agility and mobility of virtually all women.

(71) Many pregnant women complain of fatigue, loss of strength, fainting and morning sickness during various stages of their pregnancy. The degree to which a pregnant woman becomes fatigued during pregnancy is largely dependent upon her general state of health and the level of activity to which she is normally accustomed. An active woman who continues her employment during her pregnancy is less likely than an inactive, non-working woman to become fatigued during early stages of pregnancy.

(72) Fainting occurs most frequently when a person, pregnant, or non-pregnant, stands suddenly after being in a fixed position, and least frequently when a person is on her feet moving around. Fainting in pregnant women is most common in the very early weeks and after the twenty-eighth

week of pregnancy.

(73) Morning sickness or nausea affects at least 50% of all pregnant women. This condition is rarely disabling and can be ameliorated through diet regulation. Dr. Hellegars has observed that engaging in some activity such as work will take a pregnant woman's mind off of her nausea and thus lessen its effects.

(74) There were no empirical studies or hard data concerning the effects of continued work upon the unborn child of a flight attendant. Dr. Whaley conjectured that the natural physiological anemia of a pregnant woman coupled with the high altitude work environment and physical exertion accompanying the position could adversely affect the oxygen tension in the blood to the detriment of the fetus. It was further speculated that

this decrease in oxygen tension could promote miscarriages and premature births. Dr. Whaley's theory has no widespread acceptance in the medical community, though it is deemed by many to be a matter worthy of investigation.

(75) Drs. Prichard and Hellegars were of the opinion that the increased blood volume and cardiac output associated with pregnancy insure that both the fetus and flight attendants receive sufficient amounts of oxygen.

(76) There was also testimony concerning the manner in which a fetus might be affected by a plane crash or by the rapid decompression and trauma sometimes associated with air turbulance. While a sudden decompression of the aircraft cabin would reduce the amount of available oxygen, the evidence shows that a fetus and

its mother would be more likely to adjust to such conditions than non-pregnant persons. The superior anaerobic metabolism of the fetus accounts for this adaptability.

(77) It was speculated that the high altitude at which an aircraft flies increases a flight attendant's exposure to atmospheric radiation which could produce birth defects. There was no empirical data to substantiate this hypothesis.

(78) In sum, the evidence that continued flying by a pregnant flight attendant constitutes a danger to the unborn child is largely speculative and unsupported by current medical opinion.

(79) Pregnant and non-pregnant flight attendants share certain inherent occupational risks. Sudden decompression and severe turbulence

threaten all flight attendants. Fortunately, the incidents of emergency decompression are exceedingly rare and result in very few injuries. Air turbulence, while common, is rarely of succificient intensity to cause injury. From 1970 through 1974, statistics covering 2.5 million completed flights reveal only three reports of serious injuries to flight attendants due to air turbulence.

(80) A pregnant flight attendant faces two risks that her non-pregnant counterpart does not share: miscarriage and premature delivery. A miscarriage is defined as the termination of a pregnancy before the twentieth week. A premature delivery is the termination of a pregnancy after the twentieth week but prior to full term.

(81) Spontaneous abortion prior to

implanation is never incapacitating and most women who abort prior to implantation do not know they are pregnant until the spontaneous abortion occurs. Approximately 10% of all implanted pregnancies will terminate in miscarriages; 90% of these will occur within the first thirteen weeks.

(82) Miscarriages beyond the sixth week of pregnancy are usually disabling. Although it is impossible to predict a miscarriage with certainty, there are reliable indicators such as spotting or bleeding. A flight attendant who is not spotting when she begins a flight has little danger of miscarrying prior to the completion of that flight.

(83) Premature deliveries are usually unpredictable and are disabling when they occur. However, many doctors recommend the comsumption of alcohol -

an item found in bountiful quantities on Eastern aircrafts - to slow or halt a premature birth once it is underway.

(84) The following is a list of flight attendant responsibilities prepared, in part, by Eastern in conjunction with the ATA Medical Committee:

I. Normal Operational Duties

Lifting -- up to 25 pounds regularly, 50 pounds occasionally.
Prolonged walking.
Prolonged standing.
Repeated bending and stooping.
Occasional overhead reaching.
Kneeling.
Pushing and pulling.
Ability to withstand recurrent training.
Assisting "extra care" passengers.

Emergency Duties

Hemlich maneuver.
Lift out emergency window exits - weight, 30 pounds each exit.
During evacuation: carry children, push passengers down slides, crawl over seats to reach exits and/or passengers, administer first aid.
Carry out overwater ditching

and survival procedures.
Assist with life raft - weight, 120 pounds.
Assist passengers into raft.
Operate emergency equipment for flight attendant's own use.
Mouth-to-mouth resucitation.
Psychological reactions to hijacking and in-flight emergencies.

II. Working Conditions

Cabin pressurized to 5,000 feet.
Exposed to jet engine noise.
Irregular schedules.
Occasionally long working hours (up to fourteen continuous hours).
Temperature extremes (depending upon time of year and location).
Light to severe turbulence on occasion.

(85) Recurrent training, required by Federal Aviation Administration regulations, is an annual retraining program devoted to a review and updating of safety procedures. Several members of the plaintiff class have successfully completed Eastern's recurrent training while pregnant.

(86) The record is devoid of any

evidence suggesting that early stages of pregnancy affect the ability of a flight attendant to perform her normal operational duties. The physical exertion required of a flight attendant in a non-emregency situation is no greater than that required of a homemaker. One flight attendant who has experience in both capacities indicated that it was far easier to perform her routine duties as a flight attendant while pregnant that it was to tend to her house.

(87) The emergency duties are necessarily more demanding mentally and physically than the normal operational duties. FAA regulations require that an aircraft be evacuated of passengers in ninety seconds. Many of the escape hatches are narrow. Removing the emergency windows and doors and deplaying the life raft require strength and skill. Flight attendants must also

direct the passengers and provide any necessary instructions. In short, a flight attendant must be quick thinking, agile and mobile in emergency situations.

(88) Although Eastern's experts believed that a flight attendant should cease work immediately upon knowledge of pregnancy, they were frank to admit that there was virtually no empirical evidence to support their position as to the first trimester of pregnancy. Dr. Serrano, Eastern's medical director, conceded in a letter to Eastern's General Counsel dated December 13, 1973, that medical and safety considerations did not justify forced maternity leave during the first trimester of pregnancy. In that letter, Dr. Serrano expressed agreement with another airline's recent decision to allow flight attendants to continue flying during their first trimester of pregnancy "since the reasons

for denial for medical and/or safety considerations during this period of pregnancy are rather weak if at all present."[3]

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[3] A letter to Mr. Bell in its entirety reads as follows:

> Attached is a copy of a response made to Dr. Lederar, Medical Director of American Airlines, regarding the flight status of pregnant flight attendants. Notice that American has changed their policy, allowing flight attendants to fly during their first trimester of pregnancy.
>
> I tend to agree with Dr. Lederar since the reasons for denial for medical and/or other safety considerations during this period of pregnancy are rather weak, if at all present. However, I do certainly agree and strongly support the grounding of flight attendants once the uterus has sprung out of the pelvis and reached the abdominal cavity -- that is, roughly, during the 14th to 16th week of pregnancy.
>
> While Dr. Lederar's letter to Mr. Pascuito is quite comprehensive, I feel that the stronger medical and safety points for grounding

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(89) Eastern's justifications for its involuntary maternity leave policy were, in the Court's view persuasively refuted by the plaintiff's experts. Drs. Pritchard and Hellegars, after reviewing a list of flight attendant duties and watching a movie prepared by Eastern demonstrating emergency procedures, unequivocally concluded that flight attendants experiencing normal pregnancies could perform both normal

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flight attendants following the 16th week of pregnancy are:

> Flight attendants are more prone to acute complications during this period (placenta preevia, abrupt placenta, etc.).
>
> They shift their base of sustentation backwards and their line of gravity forward. This tends to compensate the weight of the abdomen at the front of the baby, making them

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and emergency duties without difficulty through the twentieth week of pregnancy. These doctors were of the view that increased girth and abdominal expansion resulting in decreased agility are the key limiting factors for a pregnant flight attendant, but that

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> clumsy in their movements and creating a large potential for in-flight accidents.
>
> Women, as their pregnancy progresses, develop a keen maternal instinct which may, in case of an accident, cause them to seek protection for their unborn baby rather than to assist passengers during the crisis.
>
> Evacuation procedures are extremely cumbersome during the last few months of pregnancy because of the additional weight in both the flight attendant and the previous mentioned change in the base of sustentation and the line of gravity.

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these factors are generally insignificant until after the twentieth week. The Court finds the testimony of Drs. Pritchard and Hellegars to be convincing and harmonious with the prevailing current medical opinion.

(90) The discomforts of morning sickness, fatigue and fainting, as noted earlier, are primarily associated with very early or late stages of pregnancy. In addition to expert testimony and the testimony of many flight

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I hope these comments will help you in some of the legal procedures that you are encountering in this area.

Julio R. Serrano, M.D.

Where Dr. Serrano's conclusions differ from those ultimately reached by the Court, his letter is highly significant, in the Court's view, because it shows that even Dr. Serrano, upon whom Eastern relied heavily to justify its policy, could articulate no medical or safety considerations to support Eastern's blanket policy reference pregnant flight attendants.

attendants, experience bears out that these conditions do not compromise the safe operation of an aircraft. It has been the experience of Eastern and other airlines (such as TWA and National Airlines) that many flight attendants continue to work through the first trimester. There is not a single instance in the record of a pregnant flight attendant becoming incapacitated because of nausea or fainting. The Director of Medical Services for TWA noted in a letter dated July 9, 1974 that TWA's experience with pregnant flight attendants supported the conclusion that the early months of pregnancy are not incompatible with the duties of a flight attendant.

(91) On February 1, 1973, Dr. Carter addressed the Obstetrics and Gynecology Department of the Mayo Clinic concerning pregnant flight attendants.

The duties of a flight attendant were discussed in great detail. The various effects of pregnancy such as morning sickness, fatigue, girth, etc. were considered. The consensus reached by the Mayo Clinic staff was that during the first trimester a flight attendant could perform all of her duties without difficulty; that during the second trimester a flight attendant's ability to perform her duties varied from individual to individual; and that during the third trimester a flight attendant should not work. This consensus provided the basis for the maternity policy adopted by Northwest Airlines in December 1973. In the years since 1973, during which Northwest has permitted pregnant flight attendants to continue working, there have been no miscarriages while on duty, no complaints with regard to performance of duties and no indication of in-

creased injuries to passengers or flight attendants. The Northwest experience thus serves as empirical verification of the position of the plaintiffs' experts.

(92) While the dangers of miscarriages are real in every pregnancy, there is no acceptable evidence that the incidence of miscarriages is higher among working flight attedants than among other women. As previously indicated, the chances are minimal that a flight attendant who boards a flight without spotting will miscarry prior to completing the flight.

(93) The Court finds, in summary, that (a) through the twentieth week of pregnancy, substantially all pregnant flight attendants undergoing normal pregnancies can perform both their normal operational duties and their emergency duties as well as they normally can when not pregnant; (b) after the twentieth

week of pregnancy, due primarily to decreased agility accompanying abdominal expansion and increased girth, the ability of pregnant flight attendants to discharge their in-flight responsibilities varies from individual to individual; and (c) after the twenty-eighth week of pregnancy, all or substantially all pregnant flight attendants can no longer perform their duties as well as they normally can when not pregnant.

I. The Union

(94) At all times material to this action, the membership of the Union was at least 90% female, though several of its officers were male. Contracts were negotiated by Eastern with the Union in 1965, 1967, 1970, 1973 and 1974. The 1965 contract was negotiated prior to the effective date of Title VII.

(95) In its opening proposals for the 1967 contract, the Union intro-

duced a proposal to eliminate Eastern's "no marriage" rule for female flight attendants. The Union also proposed a clause prohibiting discrimination on the basis of sex and age. Eastern refused to accept the non-discrimination clause. The Union did secure, however, a Letter of Agreement stating "Eastern will not consider marital status only as a reason for discharge of a flight attendant during the term of the new basic agreement." The Union made no proposals with respect to flight attendant maternity. The 1967 contract contained provisions explicitly recognizing Eastern's right to terminate pregnant flight attendants.

(96) During the negotiations leading to the 1970 contract, the Union proposed the adoption of maternity leave and the elimination of pregnancy as a basis for termination. The Union renewed its proposal for a non-discrimination clause

with regard to sex and age. The Union was successful in obtaining maternity leave but Eastern again rejected the non-discrimination clause. The Union made no formal proposals concerning Eastern's policy of mandatory leaves of absence for pregnant flight attendants. No proposal was advanced to treat pregnancy in the same manner as other temporary disabilities with regard to benefits.

(97) In its opening proposals submitted in April, 1972 leading to the 1973 contract, the Union renewed its request for a non-discrimination clause and, for the first time, proposed that Eastern allow pregnant flight attendants to continue flying. On April 5, 1972, the EEOC Advisory Guidelines on pregnancy were issued. One of these guidelines, found at 29 C.F.R. § 1604.10(a), states that a "written . . . employment policy

or practice which excludes from employment . . . employees because of pregnancy is in prima facie violation of Title VII." At the negotiating table, Union officials handed Eastern negotiators a copy of the EEOC guidelines and stated that they represented Union demands. The 1973 contract contained a non-discrimination clause, but Eastern rejected the Union proposals that pregnant flight attendants be permitted to continue flying after knowledge of pregnancy. Eastern also rejected Union demands that the EEOC guidelines be made part of the contract. The contract did contain a provision granting flight attendants maternity leave with retention and accrual of seniority rights retroactive to July 1, 1972.

(98) The Union was a party to the settlement agreement in Healen v. Eastern Air Lines, supra, which generated a settle-

ment agreement providing that the accrual of seniority policy set forth in the collective bargaining agreement was to apply to pregnancies prior to July 1, 1972.

(99) In its opening proposals submitted during the negotiations for the 1974 contract, the Union presented a benefits package including medical insurance for normal pregnancies and miscarriages at a rate comparable to hospitalization for other disabilities, and 26 weeks of short-term disability eligibility for pregnancy. Eastern refused to accept this proposal and instead asserted its intention to comply with the then forthcoming decision of the United States Supreme Court in General Electric Co. v. Gilbert, 429 U.S. 125 (1976). The Union did not renew its 1972 demands.

(100) Since the promulgation of the

EEOC guidelines in April 1972, the Union has taken the position that the guidelines have the force of law. Notwithstanding this position, the Union has signed several contracts which do not conform to these guidelines.

(101) The Union's proposals with regard to maternity policies were among the last items of the Union's demand to be withdrawn or settled. These issues were withdrawn or settled only upon the failure of active mediation by the National Mediation Board to persuade Eastern to accept the Union's proposals. Had the mediation efforts been unsuccessful in bringing about an agreement, a strike would have been the only means by which the Union could have attempted to secure acceptance of their proposals. A strike could not have been called for, however, without the approval of the Union membership. Due to a lack of wide-

spread support for these issues within the Union membership, the Court is persuaded that a strike vote probably would not have been successful.

(102) Prior to negotiating each new contract with Eastern, the Union solicits and considers proposals from its members. Maternity related issues have never generated much support within the Union despite its 90-95% female composition.

(103) The Union has never filed a grievance, an EEOC complaint or a court action based upon or related to the allegedly illegal maternity practices of Eastern.

(104) In sum, the Union appears to have made some effort to secure through collective bargaining that which the plaintiffs seek in this Court. The Union has achieved limited success in altering some of Eastern's policies. These changes have been gradual in nature. For

example, the Union sought to eliminate the "no marriage" rule before pushing for maternity benefits. The Union's efforts with respect to Eastern maternity policies have been less than vigorous, but this is not surprising in light of the small support these issues have generated within the Union. Given this dearth of support, the Union was not in a position to exert great pressure.

## II. CONCLUSIONS OF LAW

### A. General Principles

The plaintiffs have the burden of establishing that the acts of which they complain constitute discrimination in violation of Title VII. General Electric Co. v. Gilbert, 429 U.S. 125, 137 n.14 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975). Only upon the showing of a prima facie case of discrimination does the burden shift to the defendant to justify the contested practices by a

legitimate nondiscriminatory reason. International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973). Unlike the plaintiff in an action rising under the Fifth or Fourteenth Amendments, a plaintiff in Title VII litigation may establish a prima facie case without regard to intent, upon proof that the effect of an otherwise facially neutral plan or classification is to discriminate against members of one class or another. Compare General Electric Co. v. Gilbert, supra, 429 U.S. at 137; Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971), with Village of Arlington Heights v. Metropolitan Housing Development, 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229, 242 (1976). If the plaintiff fails to establish a prima facie case, or if a prima facie case is adequately rebutted

by the defendant, the plaintiff can nonetheless prevail if she can prove that the contested practice is a pretext for illegal discrimination. McDonnell Douglas Corp. v. Green, supra, 411 U.S. at 804-05. With the general framework in mind, the Court will turn to the specific practices in issue.

1. MEDICAL INSURANCE PLAN:

The issue of the medical insurance plan can, in light of the Supreme Court's pronouncements in General Electric Co. v. Gilbert, supra, be disposed of almost summarily. Under Eastern's Group Comprehensive Medical Insurance Plan, benefits paid for normal delivery are substantially lower than they would be if pregnancy were treated as any other condition requiring hospitalization. In General Electric v. Gilbert, supra, the Supreme Court held that exclusion of pregnancy from an employee's disability

insurance plan does not violate § 703(a)(1) of Title VII[4] unless the exclusion of pregnancy from the insurance package has a discriminatory effect in the sense that the plan is "worth more to men than to women," 429 U.S. at 138, or unless the exclusion of pregnancy benefits is a "mere pretext" for unlawful sex discrimination, id at 136. Plaintiffs in the instant case meet neither test.

With respect to the relative worth of the plan to men compared to women, the plaintiffs engaged in extensive post-trial discovery pursuant to the Court's order reopening the record in light of Gilbert.

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[4] Section 703(a)(1) of Title VII, 42 U.S.C. § 2000e-2(a)(1) provides, in pertinent part, as follows:

> (a) It shall be an unlawful employment practice for an employer -
>
> (1) . . . to discharge any individual, or otherwise to discriminate against any indi-

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Despite this additional discovery, plaintiffs have expressed in their post-trial brief that they "do not believe there is a statistically significant disparity between benefits to male and female flight attendants" under Eastern's medical insurance plan. Thus, plaintiffs themselves recognize that they have failed to prove discriminatory effect under the standards of Gilbert.

Nevertheless, plaintiffs submit that the Court should evaluate Eastern's insurance program in light of its historical treatment of female flight attendants. Plaintiffs urge that this "bleak history of unrelenting antifamily pressure against Eastern's female employees"

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> vidual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex. . . .

justifies a conclusion that the reduced benefits for pregnancy is a pretext for unlawful sex discrimination.

In the Court's view, the viability of plaintiff's argument is this regard is in serious question. Indeed, the Court is satisfied that Eastern's policy of providing less than full coverage for pregnancy-related medical expenses is simply a economic decision concerning the allocation of limited financial resources. See Larson, Sex Discrimination as to Maternity Benefits, 1975 Duke L.J. 805, 818 (1976). Plaintiffs have offered nothing to disuade the Court from the conclusion. While Eastern's tainted history might aid the Court in interpreting any relevant facts specifically relating to Eastern's insurance coverage, plaintiffs' recitation of that history standing alone is insufficient to prove pretext.

In summary, as plaintiffs have shown neither discriminatory effect nor pretext, the Court concludes that Eastern's medical insurance program is not conducted in violation of Title VII.

2. SICK LEAVE POLICY:

With even less diffuseness than utilized in the Court's discussion of the preceding issue, the sick leave issue may be disposed of. Under Eastern's sick leave policy, flight attendants on maternity leave do not receive sick leave pay. The Supreme Court has recently upheld such a policy, however, stating that it was ". . . legally indistinguishable from the disability insurance program upheld in Gilbert". Nashville Gas Co. v. Satty, 434 U.S. 136, 143 (1977). Thus, Eastern's policy of not awarding sick leave pay to pregnant flight attendants does not violate Title VII unless plaintiffs' can show that the policy

produces a discriminatory effect or that it is a pretext for unlawful sex discrimination. Plaintiffs, in an effort to carry the burden they had in the preceding discussion, resorted to a similar pretext argument, but concede in their post-trial brief that Eastern's sick-leave policy was "inconclusive". As heretofore indicated, reliance solely on Eastern's general history of discrimination against female flight attendants is insufficient to demonstrate unlawful pretext with respect to a specific policy. The Court accordingly concludes that Eastern's sick leave policy is not violative of Title VII.[5]

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[5] It is inconsequential that sick leave pay carries with it certain peripheral benefits (such as pleasure travel privileges and group insurance coverage) not available to flight attendants on maternity leave. As plaintiffs have failed to show that sick leave benefits

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3. REINSTATEMENT POLICY:

Eastern's reinstatement policy creates a far more complex issue than either of the preceding issues addressed. Eastern guarantees reinstatement to flight attendants on maternity leave only if they return to work within 90 days after delivery, or within 6 months after delivery if additional time is medically necessary. This contrasts sharply with Eastern's policy governing reinstatement following sick leave. Leaves of absence for temporary disabilities other than pregnancy may extend for as long as three years. The method for analyzing such unevenly applied reinstatement policies was explained by the Supreme Court in Nashville Gas Company v. Satty, supra.

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as a whole are distributed in a sexually discriminatory manner, it makes no difference under § 703(a)(1) of Title VII whether the sick leave package is large or small.

In Satty, the Supreme Court considered a Title VII challenge to a facially neutral leave of absence policy under which employees returning from mandatory pregnancy leave were deprived of all accumulated seniority, whereas employees returning from leave for any other type of disability were permitted to retain their accumulated seniority. Both the district court and the court of appeals held that such a policy violated § 703(a)(2) of Title VII, 42 U.S.C. § 2000e-2(a)(2), which makes it unlawful for any employer to:

> . . . limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individuals . . . sex . . .

The Supreme Court affirmed. It was "beyond dispute", the Court stated, that Nashville Gas Company's policy of

depriving employees returning from pregnancy of their accumulated seniority acted both to deprive them of employment opportunities and to affect their status as employees.[6]

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[6] The Court is well aware that Eastern, unlike Nashville Gas Company, does not deprive employees returning from pregnancy leave of their accumulated seniority. Indeed, Eastern allows flight attendants to continue accruing seniority while on maternity leave. The issue is not simply seniority; it is reinstatement. With respect to reinstatement, the effects of Eastern's policy can be as harmful as Nashville Gas Company's policy. The essence of Ms. Satty's complaint against Nashville Gas was that the policy made it difficult for her to regain a permanent position with the company following maternity leave. An Eastern flight attendant unable to return from maternity leave within the specified time limits might similarly find it difficult, perhaps impossible, to regain her position as a flight attendant. It obviously makes no difference to an employee returning from maternity leave whether she is denied reinstatement to her former position because her employer has taken away her seniority or because her employer has imposed a time limit which she is physically unable to meet.

The Supreme Court rejected any suggestion that its holding in General Electric Co. v. Gilbert, supra, validated Nashville Gas Company's policy:

> Here, by comparison, petitioner has not merely refused to extend to women a benefit that men cannot and do not receive, but has imposed on women a substantial burden that men need not suffer ....

434 U.S. at 142. While Gilbert did hold that Title VII did not require employers to bestow greater economic benefits upon women than men simply because only women could become pregnant, the Gilbert holding did not authorize employers ". . . to burden female employees in such a way as to deprive them of employment opportunities because of their different role". 434 U.S. at 142 (footnote 7 omitted).

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7 The omitted footnote reads, in relevant part, as follows:

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The Supreme Court qualified its reading of § 703(a)(2) however by stating that pregnancy leave policies burdensome to women did not violate Title VII if justified by "business necessity". Petitioner in Satty had not shown that its policies were jusitifed by any business

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> 4. Our conclusion that petitioner's job seniority policies violate Title VII finds support in the regulations of the Equal Opportunity Employment Commission (EEOC). The 1972 Guidelines of the EEOC specify that "written and unwritten employment policies and policies involving . . . the accrual of seniority . . . and reinstatement . . . shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities." 29 CFR § 1604.10(b) [Emphasis added]. [Ellipsis in original.]

The Court stated that the quoted guideline was entitled to some weight because it was "fully consistent with past interpretations of Title VII by the EEOC" and because no conflicting opinions of other Federal agencies regulating sex discrimination had been brought to the Court's attention.

necessity, and the Supreme Court considered it fair to assume that no justification existed. The policies were therefore held to violate Title VII.

The teachings of Nashville Gas Co. v. Satty were distilled by the United States Court of Appeals for the Fourth Circuit in Pennington v. Lexington School District 2, No. 76-1755 (4th Cir. July 3, 1978) (Butzner, J.). In that case, the Court considered the School Board's policy which denied teachers on maternity leave reinstatement until the beginning of the next school year. The evidence disclosed that teachers on leaves of absence for disabilities other than pregnancy were normally reinstated during the current school year when their health permitted. Quoting from Nashville Gas Co. v. Satty, the Court of Appeals found the school board had ". . . imposed on women a

substantial burden that men need not suffer. . . . " The Court therefore held that the school board's policy violated Title VII unless it could be justified by business necessity.[8]

The central principle of Nashville Gas Company v. Satty and Pennington v. Lexington School District 2 is in the Court's view clear: If an employer's policy governing reinstatement following maternity leave is substantially more burdensome than the policy governing reinstatement following leave for other temporary disabilities, the increased burden on women must be justified by business necessity. If business necessity is not shown, the maternity leave re-

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[8] Since the district court had not fully addressed the question of business necessity, the court of appeals remanded the case for decision on that issue.

instatement policy violates § 703(a)(2) of Title VII.

Applying this principle to the instant case, the initial question is whether Eastern's maternity leave reinstatement policy is substantially more burdensome than its sick leave reinstatement policy. In responding to this query, it is important to bear in mind that Eastern's maternity leave reinstatement policy affects pregnant flight attendants very differently depending on how soon they recovery after delivery.

As to those flight attendants on maternity leave who are able to work again within 90 days after delivery, plaintiffs have not shown that Eastern's reinstatement policy imposes any substantial restriction not imposed on employees returning from sick leave. Indeed, in some respects Eastern's maternity reinstatement policy may be more generous

than its sick leave reinstatement policy; flight attendants on maternity leave may remain on leave for up to 90 days after delivery, even if they are fully recovered prior to the expiration of that time, whereas flight attendants on sick leave presumably must return to work as soon as they are physically able.

Nor does Eastern's policy substantially burden those flight attendants who recover more than 90 days but less than 6 months after delivery. They, too, are guaranteed reinstatement in the same manner as those returning from sick leave. The only difference is that flight attendants on maternity leave must show medical necessity in order to remain on leave beyond 90 days after delivery, while it has not been suggested that this is a substantial burden.

For flight attendants physically unable to return from maternity leave

until more than 6 months after delivery, however, the Court finds that Eastern's maternity leave reinstatement policy is indeed substantially more burdensome than its sick leave reinstatement policy. If pregnancy were treated like any other temporary disability under Eastern's policy, flight attendants could remain on maternity leave up to three years, if medically necessary, without losing their right to reinstatement. Under the challenged policy, in contrast, flight attendants lose their right to reinstatement if they remain on maternity leave for more than six months even if it is medically determined that it is necessary for them to do so. In the Court's view, Eastern has thus ". . . imposed on women a substantial burden that men need not suffer. . . " Nashville Gas Co. v. Satty, supra, 434 U.S. at 142. As Eastern

has not shown any business necessity for imposing this substantial burden, the Court concludes that Eastern's six month time limit on guaranteed reinstatement following childbirth violates § 703(a)(2) of Title VII.[9]

4. TRANSFER POLICY:

For similar reasons, Eastern's policy of stripping accumulated seniority from pregnant flight attendants transferred

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[9] As in Pennington v. Lexington School District 2, supra, a trial on all issues was conducted prior to the Supreme Court's decision in Nashville Gas Co. v. Satty. If anything, the Court of Appeals remanded on the issue of business necessity so that the parties would ". . . have the opportunity to initially litigate the question in the district court in light of Satty, reopening the record, if necessary, for the introduction of additional evidence." Slip opinion at 7. In the instant case, both parties have been well aware of the Satty decision and there having been no request for the introduction of additional evidence, the Court deems it appropriate to decide the issue of business necessity on the record in hand.

to ground positions also violates Title VII. Pregnancy is the only temporary disability singled out in this manner. Flight attendants experiencing temporary disabilities or illnesses other than pregnancy are permitted to transfer to ground positions, subject to job availability, without losing accrued seniority. Because Eastern's policy forces pregnant flight attendants to choose between transfer and seniority, it tends to deprive flight attendants of employment opportunities and affects their status as employees. The policy thus violates § 703(a)(2) of Title VII unless jusitifed by business necessity. See Nashville Gas Co. v. Satty, supra; Pennington v. Lexington School District 2, supra.

Eastern has advanced no such business necessity. Its only asserted justification for the transfer policy governing pregnant flight attendants is that the policy is

contained in the collective bargaining agreement. Such contention is neither legally sufficient or a source of solice to those affected thereby. The unadulterated fact is that Eastern's policy violates Title VII. The fact that the Union and the company agree upon the policy is of no consequence considering its lawfulness. See e.g. Webber v. Kaiser Aluminum and Chemical Corp., 563 F.2d 216 (5th Cir. 1977), rehearing denied, 571 F.2d 337 (1978).

5. MANDATORY MATERNITY LEAVE POLICY:

Plaintiffs' most critical challenge is to Eastern's mandatory maternity leave policy. Eastern's stated policy is to require flight attendants to cease flight duties as soon as they learn they are pregnant. Once again, this policy is far more stengent than Eastern's policy governing leave for other types of physical conditions. Eastern maintains no

overall policy specifying those physical conditions which require a flight attendant to cease flight duty. The physical ability to perform flight duties is a matter normally left to the good judgment of each individual flight attendant. Pertinentcy constitutes the sole exception to this common sense approach. Since pregnancy is confined to women, it follows that only women are automatically and involuntarily precluded from employment due to a physical condition. Once more invoking Nashville Gas Co. v. Satty, supra, the Court concludes that Eastern's mandatory maternity leave policy ". . . imposed on women a substantial burden that men need not suffer. . ." 434 U.S. at 142. This establishes a prima facie case of sex discrimination and the policy is thus violative of § 703(a)(2) of Title VII unless Eastern can justify the policy by

"business necessity" or unless Eastern can bring the policy within the scope of the "bona fide occupational qualification" (BFOQ) exception of § 703(e) of Title VII.[10] Because ". . . it is imperative not to confuse the two defenses . . ."

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[10] Section 703(e) of Title VII, 42 U.S.C. § 2000e-2(e) provides, in pertinent part, as follows:

> (e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise...

Schlei and Grossman, Employment Discrimination Law, 292, (1976), the Court will consider the business necessity and BFOQ defenses separately.[11]

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[11] Because § 703(e) is an exception to all other provisions of Title VII, it is not entirely clear whether Eastern's maternity leave policy should be tested under the "business necessity" test or the BFOQ test, or both. In Condit v. United Air Lines, Inc., 12 E.P.D. § 11,195 (E.D. Va. Sept. 3, 1976), aff'd., 558 F.2d 1176 (4th Cir. 1977), cert. denied, 16 E.P.D. § 8181 (U.S., March 20, 1978), the District Court proceeded directly to the BFOQ test, and the Court of Appeals affirmed on that basis. Likewise, the Court in In re National Air Lines, Inc., 434 F. Supp. 249 (S.D. Fla. 1977), bypassed the business necessity test, going directly to the BFOQ analysis. A different approach was taken in Harriss v. Pan Am World Airways, Inc., 437 F. Supp. 413, 432-35 (N.D. Ca. 1977), in which the Court lumped the business necessity and BFOQ analysis together under a single heading.

All of those cases, however, were decided prior to the Supreme Court's decision in Nashville Gas Co. v. Satty, supra. Satty indicates that a Court analyzing a maternity leave policy should first apply the business necessity test. However, even if the employer's policy fails the business necessity test, and

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The classical formulation for "business necessity" is articulated by the late Judge Sobeloff in the context of racial discrimination in Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir. 1971):

> . . . The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business

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thus violates § 703(a)(2) of Title VII, it is clear to this Court that the policy may nevertheless be lawful if it passes the BFOQ test under § 703(e), because § 703(e) itself explicitly states that it is available "[n]otwithstanding any other provision of" Title VII.

Accordingly, the Court deems it appropriate to first apply the business necessity test, then the BFOQ test. As a practical matter, however, the Court sees little difference between the two tests.

> purpose advanced, or accomplish it equally well with a lesser differential racial impact. [Footnotes omitted.]

This formulation has continuing validity and has been advanced by the Court of Appeals for the Fourth Circuit in cases involving sex discrimination. See Pennington v. Lexington School District 2, supra. The Court is satisfied from the evidence that Eastern cannot satisfy this test.

Eastern rests its mandatory maternity leave policy on two distinct bases. The first is Eastern's concern for the health and welfare of pregnant flight attendants and their unborn children. The second basis is Eastern's concern for the safety of its passengers.

The first basis is inadequate because Eastern does not have a sufficiently compelling business interest in the health of its flight attendants to override the discriminatory impact of its policy. Eastern's

business is transportation by air, not maternity care. Whether or not a woman must cease work for health reasons during the first trimester of her pregnancy is a decision for the woman and her doctor, not the employer. Cf., Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 61 (1976) (during first trimester, abortion decision must be left to medical judgment of woman's attending physician, without state interference). Even if Eastern did have a compelling business purpose of protecting the health of its flight attendants and their unborn children, the leave-upon-knowledge policy still would not pass the business necessity test because there are acceptable alternatives which would accomplish that purpose equally well with a lesser impact upon women. The most creditable medical testimony before the Court indicates that the work environment and responsibilities

of a flight attendant do not increase the otherwise normal risks of pregnancy. Eastern's evidence to the contrary was in the Court's view entirely speculative and is not credited by the Court.

Nor can Eastern's leave-upon-knowledge policy be justified by Eastern's concern for the safety of its passengers. The Court has no doubt, of course, that passenger safety is a sufficiently compelling business purpose to override some sexually discriminatory impact. It is also clear from the evidence that at some point pregnancy hinders flight attendants in the adequate performance of their duties and thus compromises the safe and efficient operation of the aircraft. Once again, Eastern has not chosen the least restrictive alternative. The evidence established to the Court's satisfaction that virtually all pregnant flight attendants can perform

their jobs in the same manner for many weeks after they learn of their pregnancy, as they performed their tasks prior thereto. Thus, Eastern could accomplish its purpose of assuring passenger safety "fully well with a lesser differential [sexual] impact" by setting a later date for mandatory maternity leave. Eastern's leave-upon-knowledge policy therefore fails the business necessity test as set out in Robinson v. Lorillard Corp., supra, and consequently violates § 703(a) of Title VII. That conclusion, however, is not the end of the question, for despite this violation of § 703(a), the leave-upon-knowledge policy may nevertheless be lawful if it satisfies § 703(e) of Title VII. That section permits an employee to enforce a sexually discriminatory policy ". . . in those certain instances where . . . sex . . . is

a bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of that particular business or enterprise . . ." 42 U.S.C. § 2000e-2 (e). Thus, Eastern's leave-upon-knowledge policy may be lawful if Eastern could show that non-pregnancy is a BFOQ for flight attendants.

The proper standard for determining whether a particular policy establishes a BFOQ was stated by the United States Court of Appeals for the Fourth Circuit in Arritt v. Grisell, 567 F.2d 1267 (4th Cir. 1977). Adopting the two-prong test formulated in Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976), the Court stated that an employer asserting a BFOQ defense has the burden of showing (1) that its policy ". . . is reasonably necessary to the essence of its business . . .", and that (2) the employer has ". . . a factual basis for believing

that all or substantially all persons within the class . . . would be unable to perform safely and efficiently the duties of the job involved, or that it is impossible or impractical to deal with persons. . . on an individualized basis. . . ." 567 F.2d at 1271. Although adopted in the context of age discrimination, this standard appears to be appropriate in cases involving sex discrimination.[12]

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[12] The usery formulation was based on constructions of the BFOQ exception in two Title VII sex discrimination cases. See Diaz v. Pan American World Airways, Inc., 442 F.2d 385, 388 (5th Cir. 1971); Weeks v. Southern Bell Telephone and Telegraph Co., 408 F.2d 228, 235 (5th Cir. 1969). Moreover, the language of the BFOQ exception under the Age Discrimination in Employment Act of 1967 is essentially the same as the language of the BFOQ exception under Title VII. Compare 29 U.S.C. § 623(f)(1) with 42 U.S.C. § 2000e-2(e).

In applying the Arritt v. Grisell standard, the Court must bear in mind the Supreme Court admonition ". . . that the bfoq exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex . . ." Dothard v. Rawlinson, 433 U.S. 321, 334 1977 (footnote omitted).

As under the business necessity test, Eastern cannot rest its BFOQ defense on its concern for the health and welfare of flight attendants and their unborn children. Such concerns are laudatory, but do not touch upon the essence of Eastern's business. Moreover, to the extent that such concerns are valid, Eastern has not shown that the health of all pregnant flight attendants is threatened by continued flight duties, or that it is impractical or impossible to assess the health risks of continued

flying on an individual basis. Indeed, the evidence is to the contrary.

Eastern's contention that its policy is justified by safety consideration fares little better. Although the Court fully agrees that mandatory maternity leave from flight duty "is reasonably necessary to the essence of its business" at some stage of pregnancy, the Court is satisfied that Eastern does not have a factual basis for believing that all or substantially all pregnant flight attendants are unable to perform their jobs safely or efficiently, or that it is impossible or impractical to determine on an individual basis which flight attendants can and which cannot so perform. The evidence is clear that most flight attendants can perform safely and efficiently for some time after they learn they are pregnant, and that it is possible and practical to deter-

mine individually which pregnant flight attendants may not be able to perform their assigned duties adequately due to pregnancy. The Court is therefore of the view that non-pregnancy is not a bona fide occupational qualification for a flight attendant, and that Eastern's leave-upon-knowledge maternity policy violates Title VII.

These legal conclusions merit a detailed factual explanation. Pregnancy is an evolving rather than a static condition, and the Court will assess the ability of pregnant flight attendants to perform safely in the context of the various stages of pregnancy.

Prior to the onset of abdominal expansion and increased girth, there is nothing in pregnancy per se which impairs a flight attendant's ability to work. The parade of so-called "side effects" of pregnancy -- morning sickness, fatigue,

back strain and the like -- do not generally result in incapacitation. The evidence is overwhelming that these conditions do not affect the performance of a flight attendant. Eastern itself acknowledges that a vast majority of its pregnant flight attendants continue to work through their first trimester of pregnancy, the period when most of these problems are most severe. TWA, National and other airlines have indicated similar experiences. Yet Eastern could not document a single instance where pregnancy adversely affected a flight attendant's job performance.[13] Similarly, Northwest Air-

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[13] Eastern did bring to the Court's attention one instance of a flight attendant who took herself off a flight sequence due to hemorrhaging. She subsequently suffered an abortion. There was evidence, however, to the effect that that particular flight attendant was conscious of difficulties prior to boarding the flight, in that she had been spotting.

lines, which for years has permitted pregnant flight attendants to work through the second trimester upon a doctor's approval, has experienced no difficulty whatsoever.

Even should the consequences of pregnancy prove to be abnormally troublesome for some individuals, it cannot be said that those individuals cannot be identified. A flight attendant knows at any given time whether she is experiencing extreme fatigue or morning sickness. Indeed, it is often these very symptoms which first alert a woman to the possibility that she may be pregnant. There is no evidence of any kind that pregnant women who are physically unable to work will act less responsibly in reporting their problems than workers suffering from adverse physical conditions unrelated to pregnancy.

The Court has carefully scrutinized the evidence as to miscarriages and pre-

mature deliveries. Miscarriages beyond the sixth week of pregnancy and all premature deliveries are disabling. Most miscarriages occur during the first thirteen weeks of pregnancy -- a time during which Eastern admits its pregnant flight attendants continue to work. Should either of these contingencies occur, a flight attendant could not perform her normal operation or emergency duties. A great preponderance of evidence reflects, however, that at any given time during an individual woman's pregnancy, the onset of a miscarriage or premature delivery is predictable prior to the actual disablement. While it may not be possible as a general proposition to predict which women will miscarry during pregnancy, it is possible, with considerable accuracy, for an individual woman to determine whether she is likely to miscarry within the time it takes to complete a given flight.

Thus, if a woman is not exhibiting warning symptoms, such as spotting, when she boards a six to eight hour flight, there is little chance that she will become disabled before the flight is concluded.[14]

In summary, for the first twenty weeks following inception, a pregnant flight attendant suffering no complications can perform her duties -- both normal and emergency -- as well as she could in a non-pregnant state. She is able to open emergency escape exits, deploy life boats, give evacuation instructions and

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[14] While it has not been brought to the Court's attention as to whether Eastern operates any flights which consume more than six hours from boarding to landing, the evidence does indicate that a pregnant flight attendant might be unable to determine whether she might become disabled before the completion of her flight or flight sequence in the event Eastern does operate such flights. The Court deems it appropriate therefore to conclude that non-pregnancy is a BFOQ with respect to flights of more than six hours duration.

directions, carry children, perform first aid, and tend to the less demanding routine of a normal flight. The Obstetrics and Gynecology Department of the Mayo Clinic has found no reason why a pregnant flight attendant cannot continue to work through this stage of her pregnancy. The experience of TWA, Northwest, and indeed even Eastern, supports this conclusion. With the exception of miscarriages and premature deliveries, there is no reason why the adverse consequences of pregnancy cannot be subject to the same policy as all other physical conditions. That is, the determination as to whether the condition warrants not flying should be left to the good sense of the flight attendant. The occurrences of miscarriages and premature deliveries are sufficiently predictable to allow such a policy without compromising safety.

The Court also finds that as of the twenty-eighth week of pregnancy, virtually all pregnant flight attendants should discontinue working as flight attendants. There was a complete agreement among the experts that during this late stage of pregnancy a flight attendant's decreased agility would render her less able to react quickly in an emergency. As substantially all pregnant flight attendants would be unable to perform their duties past the twenty-eighth week of pregnancy, Eastern's mandatory maternity leave policy is jusitifed from that time on.

Accordingly, the Court concludes that being less than twenty-eight weeks pregnant is a bona fide occupational qualification for being a flight attendant.

The period between the twentieth and twenty-eighth week of pregnancy involves abdominal expansion and fetal growth occuring at individual rates. The Court

is satisfied that ". . . the ability of any particular pregnant woman to continue to work . . ." during this period ". . . is very much an individual matter." Turner v. Dept. of Employment Comm'n., supra, 423 U.S. at 46, quoting Cleveland Bd. of Education v. LaFleur, supra, 414 U.S. at 645. Those pregnant flight attendants who have developed to the point where their agility and efficiency is significantly decreased can be identified. Those who have not developed to that point are entitled to continue work.

In summary, Eastern's blanket policy that pregnant flight attendants must cease flight duties cannot be justified in law or in fact, either as a business necessity or a BFOQ.

But even if Eastern's mandatory maternity leave policy could be justified as a business necessity or BFOQ, the Court is persuaded that the policy would never-

theless violate Title VII because, in the Court's view, Eastern's purported justifications for the policy are " . . . mere pretexts designed to effect an invidious discrimination . . ." against women. Nashville Gas Co. v. Satty, supra, 434 U.S. at 145, quoting General Electric Co. v. Gilbert, supra, 429 U.S. at 135.

The Court simply does not believe that Eastern's mandatory maternity leave policy has its genisus in a concern for the safety of its passengers. A more realistic assessment of the policy's origin requires a historical perspective. The evidence before the Court demonstrates a clear and continuing pattern of sex discrimination on the part of the defendant. Eastern refused to hire married flight attendants until January 1, 1973. Although this policy was applicable to both men and women, its impact fell most heavily on women because from 1958 or 1959 until 1973,

Eastern hired only female flight attendants. Thus, for almost 15 years, Eastern's "single-only" hiring policy affected only women. During this period, pilots and other male Eastern in-flight employees were permitted to marry and continue working. Women were not afforded this privilege until 1965. Even then flight attendants who became pregnant prior to 1970 were subject to termination. Fatherhood carried no such penalties.

It is thus readily apparent that Eastern has erected barriers to employment applicable to women but not to men who desire both a career and a family. It is the purpose of Title VII to eliminate such barriers which are premised on the ". . . ancient canards about the proper role of women. . ." Phillips v. Martin Marietta Corp., 400 U.S. 542, 545 (1971)(Marshall, J., concurring). In this light, it would be entirely unrealistic to assume that

Eastern's mandatory maternity policy is the product of reasoned decision concerning safety. It is precisely the type of policy Judge Craven had in mind when he wrote: ". . . There is much to be said for old fashioned motherhood; but, we think, it is better said by women than by [an employer] in the form of an inflexible regulation based on a false and irrational premise. . ." Cook v. Arentzen, 14 E.P.D. ¶ 7544 at 4702 (4th Cir. 1977). Eastern's policy, in short, is the remnant of a historical pattern of discrimination based on antiquated assumptions about the role of women, family and employment. Such ". . . general policy and practice with respect to minority employment . . ." is relevant to a discussion of pretext. McDonnell Douglas Corp. v. Green, supra, 411 U.S. at 804-05 (footnote omitted).

Eastern's laxity in enforcing its mandatory maternity leave policy also in-

dicates that its concern for safety in that regard is confined to the courtroom. Despite actual knowledge that flight attendants routinely continue to work through the third month of pregnancy, Eastern has yet to make the slightest effort to enforce its policy. A simple comparison of claims filed for maternity benefits with the date a flight attendant commenced maternity leave would in most cases reveal whether or not a given flight attendant had complied with the policy. No such comparison has ever been made by Eastern.

The mandatory maternity leave policy, moreover, is inconsistent with the great weight of medical opinion, as illustrated by the position of the American College of Obstetricians and Gynecologists. Nor are there any FAA regulations which require such a policy or even suggest

that it is advisable. Eastern's policy was pursued in the complete absence of any medical support. Eastern's entire medical defense was

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15 In fact, the FAA has on several occasions expressed its marked disapproval of policies such as Eastern's. The case of Pan American World Airways, Inc. v. Marshall, 439 F.Supp. 487 (S.D.N.Y. 1977) for example, details Pan Am's struggle for a preliminary injunction after the FAA had determined that Pan Am's maternity leave policy - a policy nearly identical to Eastern's - violated an FAA anti-discrimination regulation by imposing "a penalty for childbearing." In MacLennan v. American Airlines, Inc., 440 F.Supp. 466, 471 (E.D. Va. 1977), another suit challenging mandatory maternity leave upon knowledge of pregnancy, the Court quoted the following portion of a January 31, 1977 letter from Dr. H. L. Reighard, a Federal air surgeon:

> "[W]e feel that a pregnant woman with no complications is in good health. The consideration of whether a flight attendant should fly when pregnant continues to be a matter between herself, her doctor and her employer."

FAA's refusal to endorse a mandatory maternity leave policy such as Eastern's has considerable significance when the FAA's statutory duty to assure aircraft safety is taken into account.

assembled after the commencement of litigation. Such after the fact justification smacks of the type of pretext alluded to in McDonnell Douglas Corp. v. Green, supra.

Going beyond pregnancy, Eastern's general practices belie the notion that it is acutely concerned about the physical condition of its flight attendants. There are no regular periodic physical exams for any flight attendants, male or female. At no time does Eastern attempt to measure the agility, strength or quickness of its flight attendants. There are no written standards as to when a flight attendant should not fly because of a physical difficulty. This background contrasts starkly with that presented in Hodgson v. Greyhound Lines, Inc., 499 F.2d 859 (7th Cir. 1974) and Usery v. Tamiami Trail Tours, Inc., supra. In those cases, the employers'

genuine concern for the physical fitness of their drivers was demonstrated by rigorous enforcement of their safety standards. Here, such evidence is woefully lacking.

Finally, the Court must consider the fact that Eastern has adopted the most restrictive policy. When a plaintiff shows that alternative policies equally serve an employer's legitimate interests without a similarly undesirable sexual impact, "[s]uch a showing would be evidence that the employer was using [the practice] merely as a 'pretext' for discrimination. . ." Albemarle Paper Co. v. Moody, supra, 422 U.S. at 425. The experience of other airlines indicates that there is no conflict between early stages of pregnancy and the safe and efficient performance of a flight attendant. Indeed, such has

been the experience of Eastern itself. Dr. Serrano, Eastern's Medical Director, admitted as much in his letter dated December 13, 1973. Despite this, Eastern continues to maintain a policy which maximizes economic hardship on women. This policy contrasts with the position taken towards non-sex-linked conditions such as diabetes and epilepsy. For these conditions, which are not sex-linked, Eastern makes individualized determinations as to the fitness to fly as opposed to the blanket prohibition applicable to pregnancy.

Given Eastern's history of hostility towards working women with families, the total lack of enforcement of its policy, the lax approach towards physical fitness generally, and the severity of the exclusion for pregnancy compared to sex-neutral physical

infirmities, the conclusion is compelled that Eastern's safety rationale is a mere pretext for invidious discrimination against women.

Two additional observations must be made concerning Eastern's defense. Eastern's policy, as it presently operates, affects two vitally important interests of all persons. First, Eastern's policy penalizes "the pregnant [flight attendant] for deciding to bear a child," a decision that involves ". . . one of the basic civil rights of man. . ." Cleveland Bd. of Education v. La Fleur, supra, 414 U.S. at 640, quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). Second, Eastern's policy amounts to a temporary but relatively lengthy denial of the opportunity to work, which is not justified by legitimate concerns. As noted by the Supreme

Court, ". . . the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." Truax v. Raich, 239 U.S. 33, 41 (1915). Title VII represents a national commitment to secure that freedom in the private sector of our economy as well. ". . . What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." Griggs v. Duke Power Co., supra, 401 U.S. at 431. Accord, International Brotherhood of Teamsters v. United States, supra; McDonnell Douglas Corp. v. Green, supra, 411 U.S. at 800; Albermarle Paper Co. v. Moody, supra, 422 U.S. at 417-18. Eastern's manda-

tory maternity leave policy, unlike a denial of insurance benefits for pregnancy, unnecessarily and directly precludes employment for a fixed duration. As such, this policy cannot stand.

It is also necessary to place Eastern's concern for safety in proper perspective. A flight attendant's disablement, as opposed to the disablement of a pilot or bus driver, does not directly endanger the passengers. An aircraft can function normally and safely even if a flight attendant becomes disabled. Only in an emergency situation does a flight attendant play an active role in safety. Thus, only when a flight attendant's disablement and an emergency situation occur <u>simultaneously</u> is a safety problem presented. The evidence does not indicate that the likelihood of such simultaneous

occurrence is appreciably increased by a flight attendant's pregnancy. Indeed, Judge Bryan of this court has stated that the likelihood of a safety problem arising from a flight attendant's pregnancy-related disability is "minimus". MacLennan v. American Airlines, Inc., supra, 440 F.Supp. at 471 (E.D. Va. 1977). The record in the instant case fails to support even that conclusion. Assuming arguendo however, that there is a minute probability that a pregnant flight attendant's disablement will result in harm to air line passengers, such does not justify the defendant's adoption of the most stringent possible policy regarding pregnant flight attendants. See Usery v. Tamiami Trail Tours, Inc., supra, 531 F.2d at 236.

The Court deems nothing in its current conclusions to be in conflict

with the holding of the United States Court of Appeals for the Fourth Circuit in Condit v. United Air Lines, Inc., 558 F.2d 1176 (4th Cir. 1977) (per curium) cert denied, 16 E.P.D. ¶ 8181 (U.S. March 20, 1970). That case involved a Title VII challenge to United Air Line's policy virtually identical to the policy challenged here, that flight attendants must discontinue flying as soon as they become aware that they are pregnant. The District Court found, on conflicting expert testimony, that pregnancy could incapacitate a flight attendant in ways that might threaten the safe operation of an aircraft, and that non-pregnancy was therefore a BFOQ for flight attendants. Condit v. United Air Lines, Inc., 16 E.P.D. ¶¶ 11, 195 (E.D. Va. 1975). The Court of Appeals affirmed, stating:

> The district court's ruling that United's policy is a bona fide occupational qualification is based on findings of fact which, on the evidence presented by this record, are not clearly erroneous. . . .

558 F.2d at 1176-1177. From this language it is clear that the Court of Appeals did not hold as a matter of law that non-pregnancy is a BFOQ for a flight attendant. Indeed, the Court of Appeals did not even express its agreement with the district court's finding of fact in Condit, stating only that such findings were "not clearly erroneous." The Court is satisfied that Condit is therefore no obstacle to this Court's conclusion in the instant case, based as it is on findings of fact different from those in Condit.

Nor is it surprising that this Court's findings of fact should differ from those of the district court in

Condit. Condit is only one of four courts which have previously held full trials on the merits regarding air line maternity leave policies requiring flight attendants to cease flying upon knowledge of pregnancy. Two of those courts have upheld the requirement of non-pregnancy as a BFOQ, see Harriss v. Pan American World Airways, Inc., 437 F.Supp. 413 (N.D. Ca. 1977); Condit v. United Air Lines, supra; two courts have held that non-pregnancy is not a BFOQ, see MacLennan v. American Air Lines, Inc., supra; In re National Air Lines, Inc., Maternity Leave Practices and Flight Attendant Weight Program Litigation, supra.[16] The

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[16] One other court considered the same issues, but granted summary judgment in favor of the airline without a hearing. EEOC v. Delta Airlines, Inc., 441 F.Supp. 626 (S.D. Tex. 1977).

Footnote continues on the following page.

split in the courts is not surprising, for every case must be decided on the evidence presented in that particular case.

6. THE UNION:

What has been said thus far applies only to the defendant Eastern. The Court must still consider the role of the Union. Plaintiffs argue that the Union is guilty of engaging in unlawful employment practices because it signed a heretofore mentioned collective bargaining agreement and failed to take adequate steps to challenge the illegal provisions contained therein. The Court is in accord with this view. The Union acquiesed in the discrimination and never

Footnote continued from previous page

That Court's summary judgment has no persuasive value whatsoever, in this Court's view, because there the Court based its decision on Condit and Harriss, and failed to consider either MacLennan or In re National Air Lines, supra.

so much as filed a grievance. The Fourth Circuit Court of Appeals has stated:

> The rights assured by Title VII are not rights which can be bargained away -- either by a union, by an employer, or by both acting in concert. Title VII requires that both union and employer represent and protect the best interest of minority employees. Despite the fact that a strike over a contract provision may impose economic costs, if a discriminatory contract provision is acceeded to the bargainee as well as the bargainor will be held liable. Robinson v. Lorilard Corp., supra, 444 F.2d at 799 (footnote omitted). See also Russell v. American Tobacco Co., 528 F.2d 357, 365-66 (4th Cir. 1975).

Accordingly, the Court concludes that the Union is guilty of unlawful discrimination.

The Court notes, however, that as a practical matter the Union was virtually powerless to alter Eastern's policy. But cf. Local 194, Retail, Wholesale and Department Store Union v. Standard Brands, Inc., 540 F.2d 864 (7th Cir. 1976); Airline Stewards and Stewardesses

Association, Local 550 v. American Air Lines, Inc., 490 F.2d 636 (7th Cir. 1973). The policy was in no real sense the product of negotiation. It was unilaterally imposed by Eastern. The Union acquiesed under protest. As of July 2, 1965, the Union faced a number of discriminatory practices imposed by Eastern with respect to women. Female flight attendants at that time stood to lose their jobs if they married or had a child. The Union, in good faith, began to whittle away at these practices in a logical progression. The vigor with which the Union attacked maternity related issues was undoubtedly limited by the absence of support within its general membership.

The Court is aware that back pay awards serve a dual purpose of compensating victims of discrimination

and inducing both employers and unions to voluntarily eliminate illegal employment practices. Albemarle Paper Co. v. Moody, supra, 422 U.S. at 418; Russell v. American Tobacco Co., supra, 528 F.2d at 366; Hairston v. McLean Trucking Co., 520 F.2d 226, 231 (4th Cir. 1975). In the instant case however, the Union was more than willing to eliminate the illegal practice. It was Eastern and not the Union which insisted on the policy and refused to alter it. The Union initiated the only bona fide efforts to secure for women flight attendants the right to continue working during pregnancy. Under these circumstances, assessment of back pay awards remain against defendant Eastern only. Johnson v. Ryder Truck Lines, Inc., No. 76-1293 SSL. Op. p.3 (4th Cir. April 1, 1977); Williams v. Norfolk and Western

Railway Co., 530 F.2d 539, 543 (4th Cir. 1975). Nevertheless, as a signatory to numerous collective bargaining agreements containing sexually discriminatory maternity leave policies, the Union must remain in this litigation as a defendant to the end that appropriate injunctive relief may be awarded. International Brotherhood of Teamsters v. United States, supra, 431 U.S. at 356, n.43.

III. RELIEF

The appropriate relief must of necessity vary depending on the particular policy to which any such relief is directed. As a general matter, however, the Court will enjoin the defendants from enforcing the present policies governing reinstatement, transfer and mandatory maternity leave, all of which the Court has held to be violative of Title VII. These policies

are to be replaced by policies treating pregnancy in the same manner as all other temporary disabilities, consistent with this memorandum, for purposes of reinstatement, transfer and mandatory leave. To facilitate the development of such new policies, counsel for the respective parties will be ordered to meet and confer within 30 days of this date, to submit to the Court for approval within 60 days of this date such policies as may be agreed upon by all parties. In the event the parties are unable to reach agreement, each party will submit its respective proposal to the Court within the aforementioned 60 days, for the Court's consideration.

Similarly, the parties will be directed to meet and confer within 30 days of this date in an effort to

reach agreement concerning appropriate retrospective relief. As these issues may be more complex, the parties will be given 90 days from this date to submit the resulting joint agreements or differences, as the case may be, to the Court for approval or resolution. The parties are advised, however, that the line of demarcation being between prospective and retrospective relief shall be the date of this memorandum, not the date on which final relief is proved, and that all class members shall from this date forward fully benefit from whatever new policies are eventually developed to replace those herein held invalid. Delay in implementing new policies will therefore benefit no one. Indeed, the administrative inconvenience of awarding appropriate benefits under the new policies will become more complex with

the passage of time.

To insure that class members will be protected against unlawful sex discrimination while new policies are being developed, the Court will order the following interim prospective relief:

A. Mandatory Maternity Leave Policy

Eastern may continue to require flight attendants to report pregnancy immediately upon knowledge. Until the end of the first trimester, however, the decision whether or not to continue flight duties shall rest exclusively with the individual flight attendant and her doctor.

During the second trimester, Eastern may play a role in the flight attendant's decision. From the 13th through 20th weeks of pregnancy, Eastern may condition continued flying duties on monthly written permission from the flight attendant's personal

doctor.[17] From the 21st through 28th weeks, a period of increasing physical difficulty for most pregnant women, Eastern's role may become more active. During that period, Eastern may condition continued flying duty on weekly written permission from the flight attendant's doctor. The foregoing however, is not to be construed as precluding Eastern's right to challenge the particular attendant's job performance. The Court recognizes that medical decision is no substitute for performance of the responsibilities for which the flight attendant is being paid. Therefore, if at the conclusion of any flight, the captain or crew chief for that particular flight reports in writing that

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[17] Logically, such written permission might be required at approximately the end of the 12th, 16th, and 20th weeks of pregnancy. These dates may, of course, be flexible.

a flight attendant was unable to perform her duties satisfactorily due to pregnancy, Eastern may immediately require that flight attendant to cease flying, regardless of the stage of her pregnancy.[18]

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[18] The Court recognizes that this is a broad power, but it seems to be a necessary one. An important premise of the Court's decision on mandatory maternity leave is that most pregnant flight attendants can predict possible in-flight difficulties and will act responsibly by not flying when the likelihood of such difficulties is relatively high. If a pregnant flight attendant in fact cannot perform her duties because of her pregnancy, obviously she is either unable to predict her own limitations or is not acting responsibly.

The defendants are cautioned, however, that the Court will not tolerate a systematic abuse of this maternity leave power. If the parties choose to incorporate such a power into their final agreement on maternity leave, presumably they will include some review mechanism or other limitation on same. In the meantime, the Court has no reason to believe that the removal power will be used other than responsibly and within the spirit of the decision in the instant case.

After the 28th week of pregnancy, of course, Eastern may require all flight attendants to cease flight duties.

B. Reinstatement Policy

To bring maternity leave reinstatement policy into a parallel with the general sick leave policy, Eastern and the Union must guarantee reinstatement to a flight attendant on maternity leave for as long as three years following delivery if the flight attendant can demonstrate that her continued absence from work was or is medically indicated. With respect to those flight attendants who cannot show such medical necessity for extended absence, Eastern may continue to limit the period of guaranteed reinstatement to 90 days following delivery.

C. Transfer Policy

Eastern and the Union must henceforth permit pregnant flight attendants

to transfer to ground positions, subject to job availability, without loss of in-flight seniority.

The Court reiterates that the relief ordered is interim relief only. The parties may freely agree to modify these interim policies when they meet and confer, in any manner not inconsistent with the Court's conclusions of law and facts, and any agreements reached by the parties are to be submitted forthwith to the Court for its approval or disapproval.

Finally, the Court wishes to stress its profound hope that the parties will reach agreement on comprehensive new policies, and will not require the Court to design such policies. The problems of mandatory leave, reinstatement and transfer are highly complex and call for a detailed, pragmatic solution. The parties, not the courts, have the knowledge and expertise to mold the

appropriate policies. The Court, as always, stands ready to render such direction as may be appropriate.

An appropriate order shall issue.

/s/ Robert R. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

Date: September 6, 1978

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION *

| | | |
|---|---|---|
| CATHERINE M. BURWELL, et al., | ) | |
| Plaintiffs, | ) | |
| v. | ) | Civil Action No. 74-0418-R |
| EASTERN AIR LINES, INC., et al., | ) | |
| Defendants. | ) | |

--AND--

| | | |
|---|---|---|
| SHARYN D. CLAYTON, | ) | |
| Plaintiff, | ) | |
| v. | ) | Civil Action No. 75-0688-R |
| EASTERN AIR LINES, INC., | ) | |
| Defendant. | ) | |

---

ORDER

For the reasons stated in the memorandum of the Court this day filed, and

deeming it proper so to do, it is ADJUDGED and ORDERED as follows:

1. Judgment be, and the same is hereby entered in favor of the defendant to the effect that Eastern's separate treatment of pregnancy under its Group Comprehensive Medical Insurance Plan, and its exclusion of maternity leave from its paid sick leave plan, do not violate Title VII of the Civil Rights Act of 1964 with respect to Eastern's flight attendants;

2. Judgment be, and the same is hereby entered in favor of plaintiffs to the effect that Eastern's present policy regarding mandatory maternity leave, guaranteed reinstatement following maternity leave, and transfer to ground positions during maternity leave, vio-

late § 703(a) of Title VII with respect to Eastern's flight attendants;

3. The maternity leave, reinstatement and transfer policies declared invalid in the preceding paragraph are hereby declared to be null, void and of no effect, and the defendants, their employees, agents, representatives and all acting in concert therewith be and they are hereby enjoined from applying or enforcing said policies from this date forward;

4. Counsel for all parties shall meet and confer within thirty (30) days of this date in an effort to reach agreement on new policies, not inconsistent with the memorandum filed herewith, to replace those policies herein declared invalid, and shall file with the Court within forty-five (45) days of this date any joint agreements for approval of the Court; and in the event that agreement

is not reached, the parties shall file separate proposals for the Court's consideration;

5. Counsel for all parties shall meet and confer within thirty (30) days of this date in an effort to reach agreement concerning an appropriate retrospective relief to redress any injuries sustained by members of the plaintiff class as a result of the various policies declared invalid in paragraph 2 above, and shall file with the Court within sixty (60) days of this date the resulting joint agreements or separate proposals for the Court's consideration; and

6. Until appropriate new policies are in effect to replace those policies herein declared invalid, the parties shall adhere to the interim policies governing maternity leave, reinstatement and transfer set forth in the accompanying memorandum.

Let the Clerk send a copy of this order and the memorandum to all counsel of record.

/s/ Robert R. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

Date: September 6, 1978

# APPENDIX C

## STATUTES AND REGULATIONS INVOLVED

Sections 703(a) and (e)(1) of Title VII of the Civil Rights Act of 1964, 78 Stat. 255, as amended by the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. §§ 2000e-2(a) and 2000e-2(e)(1)(1970 and Supp. V. 1975), provide:

> (a) It shall be an unlawful employment practice for an employer --
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
>
> . . . .

> (e) Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . . .

Section 1604.2(a)(1) of the Equal Employment Opportunity Commission Guidelines on Discrimination Because of Sex, 29 C.F.R. Part 1604 (1979), provides:

> § 1604.2 Sex as a bona fide occupational qualification.
>
> (a) The commission believes that a bona fide occupational qualification exception as to sex should be interpreted narrowly. Label [sic] -- 'Men's jobs' and 'Women's jobs' -- tend to deny employment opportunities unnecessarily to one sex or the other.
>
> (1) The Commission will find that the following situations do not warrant the application of the bona fide occupational qualification exception:

(i) The refusal to hire a woman because of her sex based on assumptions of the comparative employment characteristics of women in general. For example, the assumption that the turnover rate among women is higher than among men.

(ii) The refusal to hire an individual based on stereotyped characterizations of the sexes. Such stereotypes include, for example, that men are less capable of assembling intricate equipment; that women are less capable of aggressive salesmanship. The principle of nondiscrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group.

(iii) The refusal to hire an individual because of the preferences of coworkers, the employer, clients or customers except as covered specifically in paragraph (a)(2) of this section.

No. 80-868

IN THE

# Supreme Court of the United States

CATHERINE M. BURWELL, ET AL.,
*Petitioners,*

v

EASTERN AIR LINES, INC.,
*Respondent.*

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR EASTERN AIR LINES, INC., IN OPPOSITION


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## QUESTION PRESENTED

Whether the court of appeals properly determined that Eastern Air Lines' mandatory maternity leave policy for flight attendants was necessary to the safe and efficient operation of its business and was not a pretext for intentional discrimination.

## TABLE OF CONTENTS


| | *Page* |
|---|---|
| Question Presented | i |
| Table of Contents | iii |
| Table of Citations | iv |
| Statutes and Regulations | iv |
| Other Authorities | iv |
| Opinions Below | 1 |
| Jurisdiction | 1 |
| Statutes and Regulations Involved | 2 |
| Statement | |
| A. The Contested Policy | 2 |
| B. The Decision of the District Court | 2 |
| C. The Decision of the Court of Appeals | 4 |
| Argument | 6 |
| Conclusion | 13 |




PREVIOUS PAGE WAS BLANK

## TABLE OF CITATIONS

### Cases


*Page*

*Airline Pilots Association* v. *Western Airlines, Inc.*, 22 EPD ¶ 30,636 (N.D. Calif. 1979) ..... 12
*Campana Corp.* v. *Harrison*, 114 F.2d 400, 405 (7th Cir. 1940) 10
*Condit* v. *United Airlines, Inc.*, 558 F.2d 1176 (4th Cir. 1977), cert. den. 435 U.S. 934 (1978) ..... 12
*Dayton Board of Education* v. *Brinkman*, 443 U.S. 526, 534-35 (1979) ..... 10
*Furnco Construction Co.* v. *Waters*, 438 U.S. 567 (1978)..... 9
*Harriss* v. *Pan American World Airways*, 437 F.Supp. 413 (N.D. Calif. 1977), aff'd. .... F.2d ...., No. 78-1214 (9th Cir. Dec. 23, 1980) .....8, 12
*McLennan* v. *American Airlines*, 440 F.Supp. 466 (E.D. Va. 1977) ..... 12
*Moody* v. *Albemarle Paper Co.*, 422 U.S. 405 (1975) .....6, 7, 8
*Nashville Gas Co.* v. *Satty*, 434 U.S. 136 (1977) ..... 2
*In Re National Airlines*, 434 F.Supp. 249 (S.D. Fla. 1977) ..... 11
*Robinson* v. *Lorillard*, 444 F.2d 791, 798 (4th Cir. 1971) cert. dis.'d 404 U.S. 1006 (1971).....3, 5, 6, 8
*United States* v. *United States Gypsum Co.*, 333 U.S. 364, 394 (1947) ..... 10
*Usery* v. *Tamiami Trail Tours, Inc.*, 431 F.2d 224, 238 (5th Cir. 1976) ..... 8


### Statutes and Regulations


28 U.S.C. §1254 (1) ..... 1
42 U.S.C. §2000e-2(a) ..... 2
42 U.S.C. §2000e-2(e)(1) ..... 2


### Other Authorities


Fed. R. Civ. P. 52(a) .....9, 10, 11

IN THE

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## BRIEF FOR EASTERN AIR LINES, INC., IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is not yet officially reported but is unofficially reported at 23 F.E.P. Cases 949. The opinion of the district court (Pet. App. B) is reported at 458 F.Supp. 474.

### JURISDICTION

The judgment of the court of appeals was entered on August 29, 1980. The petition for a writ of certiorari was filed on November 28, 1980. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

## STATUTES AND REGULATIONS INVOLVED

The relevant provisions of Title VII of the Civil Rights Act of 1964, 78 Stat. 255, as amended by the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. §§2000e-2(a) and (e)(1), are set forth at pp. 250a-251a of the petition. (Pet. App. C).

## STATEMENT

### A. The Contested Policy

The maternity leave policy at issue reads in pertinent part as follows:

> H. Flight Attendants shall, upon knowledge of pregnancy, discontinue flying as a Flight Attendant. Upon request, the company will grant such Flight Attendants leaves of absence for maternity purposes.

This provision has been included in the collective bargaining agreements negotiated by Eastern Air Lines ("Eastern") and the Transport Workers Union since March 21, 1970. (Pet. App. 138a; J.A. 450).[1]

### B. The Decision of the District Court

Eastern contended at trial that petitioners had not established a *prima facie* case because pregnancy was only one of a number of physical disabilities requiring removal from flight status for safety reasons. (J.A. 1258B). Eastern also asserted that the mandatory leave policy was a business necessity, and alternatively, that non-pregnancy was a *bona fide* occupational qualification ("BFOQ") for the flight attendant position. 42 U.S.C. §2000e-2(e)(1).

Invoking *Nashville Gas Co.* v. *Satty*, 434 U.S. 136 (1977), the district court found that petitioners had estab-

[1] "J.A." refers to the joint appendix in the court of appeals.

lished a *prima facie* case because the mandatory leave policy ". . . imposed on women a substantial burden that men need not suffer." (Pet. App. 197a). The district court then analyzed Eastern's defenses of business necessity and BFOQ.

Applying the business necessity test set forth in *Robinson* v. *Lorillard,* 444 F.2d 791, 798 (4th Cir. 1971), *cert. dis'd.* 404 U.S. 1006 (1971), the district court concluded that Eastern's interest in passenger safety was a sufficiently compelling business purpose to override the discriminatory impact of the policy; further, since all the parties agreed that pregnancy would at some point hinder flight attendants in the performance of their duties and thus compromise the safe and efficient operation of the aircraft, the district court found that the policy also satisfied *Lorillard's* requirement that the practice effectively carry out the business purpose it is alleged to serve. (Pet. App. 203a). The court nonetheless found that Eastern had failed to prove business necessity because it had not chosen "the least restrictive alternative." (Pet App. 203a). The court concluded that ". . . Eastern could accomplish its purpose of assuring passenger safety 'fully well with a lesser differential [sexual] impact' by setting a later date for mandatory maternity leave." (Pet. App. 204a).

The district court next considered Eastern's BFOQ defense. It found that non-pregnancy was a BFOQ for flight attendants twenty-eight or more weeks pregnant, and in individual cases, after twenty weeks of pregnancy. (Pet. App. 215a-216a). Further, because of the risks of miscarriage and other unpredictable disabilities, the court found non-pregnancy to be a BFOQ on flights or flight sequences of more than six hours' duration at any stage of pregnancy. (Pet. App. 213a). For the first twenty-eight weeks of pregnancy, absent a certification of individual in-

capacity, and on flights or flight sequences of a shorter duration than six hours, the district court found the BFOQ defense was not established because ". . . it is possible and practical to determine individually which pregnant flight attendants may not be able to perform their assigned duties adequately due to pregnancy." (Pet. App. 208a-209a).

Even though it was unnecessary given its finding that neither business necessity nor a BFOQ was established for the first twenty-eight weeks of pregnancy, the district court next considered petitioners' claim that the policy was a pretext for discrimination.[2] (Pet. App. 217a). It agreed with petitioners that the policy was pretextual, but it did not apply this finding to invalidate the policy in its entirety. (Pet. App. 217a). Those aspects of the policy which the district court found were justified for safety reasons were not invalidated but preserved in the court's order specifying relief. (Pet. App. 239a-242a).

As a result, the policy was held to be unlawful for some but not all parts of pregnancy, on some but not all flights, and for some but not all flight attendants, the distinguishing factor in each instance being the district court's assessment of the safety risk involved. (Pet. App. 213a, 239a-242a).

### C. The Decision of the Court of Appeals

The majority opinion of the court of appeals focused on one crucial factor: whether the petitioners had in fact proved that there were available to Eastern alternative policies which would serve its safety interests equally well with a lesser differential impact. (Pet. App. 24a-26a). This required examination of the district court's finding that setting

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[2] Eastern argued in the court of appeals that the district court's application of a pretext analysis in connection with a BFOQ defense is inappropriate as a matter of law. Because of its disposition of the BFOQ question, the court of appeals did not reach this issue.

mandatory leave at a later date would equally assure passenger safety, and, as a necessary premise to this finding, that individual determination of the ability of each pregnant flight attendant to perform her duties safely and efficiently was feasible. (Pet. App. 24a-26a, 46a).

Prior to reaching this issue, the court of appeals found that a *prima facie* case of disparate impact had been shown and that the business necessity test was the appropriate standard against which Eastern's safety defenses should be measured. (Pet. App. 33a, 35a). It agreed with the District Court's application of the test set forth in *Robinson* v. *Lorillard, supra,* and concurred in its determinations that Eastern's interest in passenger safety was sufficiently compelling to override the discriminatory impact of the policy and that the policy in fact carried out the business purpose which it was alleged to serve. (Pet. App. 45a-46a).

As to the third element of *Lorillard,* however, the court of appeals differed with the district court. The factual premise on which the trial court relied—that pregnant flight attendants likely to suffer disabling incidents can be uniformly identified in advance—was held to be "clearly wrong" by the court of appeals, which observed there was "very little, if any, evidence to support that finding." (Pet. App. 24a-25a). The court of appeals further concluded there was insufficient evidence to support the trial court's legal conclusion that adequate alternative policies existed. (Pet. App. 25a-26a, n. 6, 46a). It accordingly held that:

> Focusing all the evidence at trial through the criteria of *Lorillard* demonstrates that Eastern's policy as it relates to pregnancy after the thirteenth week results from the legitimate business necessity of safely transporting passengers.

(Pet. App. 42a).

The court of appeals also disagreed with the trial court's finding of pretext. It first observed that evidence of pretext in the form of a demonstration of alternative policies was ". . . essentially equivalent to one element of the *Lorillard* business necessity test. . . ." (Pet. App. 47a). Petitioners' failure to prove the existence of equally effective alternative policies in one context obviously precluded them from succeeding in another.

Turning to the question of Eastern's intent, the court found that Eastern had legitimately established the policy.[3] (Pet. App. 54a). Observing that the policy must be judged in accordance with its avowed purpose of promoting passenger safety, the court found that a close scrutiny of the ability of pregnant flight attendants to perform their duties was justified, and that an employer required to make a safety judgment need not display omniscience in order to avoid a legal finding of pretext. (Pet. App. 50a-53a). Rather, the test was met ". . . if all information available to the employer reasonably requires the challenged personnel practice in order to achieve an overriding business purpose." (Pet. App. 54a). Finding that Eastern satisfied this standard, the court concluded that it had not violated Title VII by establishing the policy with discriminatory intent. (Pet. App. 54a).

## ARGUMENT

The decision of the court of appeals is correct and is not in conflict with the decision of any other circuit. There is thus no occasion for further review.

I. The decision below is not in conflict with *Moody* v.

[3] The court questioned whether a showing of subjective motivation properly was part of the scheme of proof in a disparate impact case, but found it unnecessary to decide the question. (Pet. App. 47a-48a).

*Albemarle Paper Co.*, 422 U.S. 405 (1975), or with the decision of any other circuit court. The decision of the court of appeals rested upon its finding of failure of proof, not upon a refusal to consider evidence of alternative policies as required by *Moody*. Petitioners' contention that the court ignored their evidence is completely belied by the opinion.

The court of appeals specifically identified the existence of alternative policies as one of the elements of the business necessity test, considered the record evidence, and found it wanting. (Pet. App. 24a-26a, 40a-41a, 46a). It described in detail why petitioners' evidence of alternative policies was insufficiently probative. (Pet. App. 25a-26a, n. 6).[4] It held that the district court's contrary legal conclusion was founded on a factual assumption which was unsupported by the evidence. (Pet. App. 24a-25a).

This treatment of the evidence was in complete accord with *Moody*. Petitioners' real quarrel is with the court's finding that their evidence was inadequate to prove the issue. This presents no conflict with the decision of any other court and no question requiring review.

II. The court of appeals did not apply an incorrect burden of proof in its analysis of the evidence. Contrary to petitioners' contention, this case does not require the Court to consider whether an employer may meet its burden of proving business necessity by showing that it acted reason-

[4] Petitioners' claim that the court failed to consider the policy of Northwest Airlines ignores the larger issue which the court considered and resolved: whether petitioners proved that individual determination of the ability of each pregnant flight attendant to perform her duties provided an equally safe alternative to the mandatory leave policy. Northwest's policy is simply one variant within the larger category of policies based on individual determination. Further, Northwest's practices offered no guidance on the critical issue of performance in an emergency; no evidence was presented that any pregnant Northwest flight attendant had been subjected to an emergency situation. (Pet. 27-28).

ably. The court of appeals applied no such standard, but carefully adhered to the traditional test of business necessity set forth in *Moody* v. *Albemarle Paper Co., supra,* and *Robinson* v. *Lorillard, supra.*

Prior to setting forth its conclusions in detail, the court observed:

> The central issue is whether Eastern's mandatory leave policy is necessary to the safe transportation of passengers as gauged by the criteria announced in *Robinson* v. *Lorillard Corp.* (cit. omitted). . . .

(Pet. App. 14a-15a). Applying each of the *Lorillard* criteria, the court of appeals found that the need for passenger safety overrode the discriminatory impact during the fifteen-week period covered by the court's opinion, that the policy clearly carried out its intended purpose, and that there was insufficient evidence that individual determination of performance would equally accomplish this purpose with a lesser differential impact. (Pet. App. 43a-46a).

This analysis represented a straightforward application of the business necessity test. Nowhere did the court import into its analysis a holding that an employer could meet its burden of establishing business necessity simply by showing it acted reasonably.[5] Nor did it rely upon *Furnco Construction Co.* v. *Waters,* 438 U.S. 567 (1978), to limit its

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[5] The court's discussion of the judicial function in assessing the need for safety policies did not constitute any reformulation of the burden of proof. (Pet. App. 43a-45a). The court simply cautioned that where the question is the necessity of a given policy to safety objectives, a court should not facilely substitute its judgment for the employer's in the absence of evidence that the policy was contrived or discredited. (Pet. App. 44a-45a). Courts should be particularly careful not to intrude into the evaluation of safety risks where the issues are highly complex, involve risk to human life, and are not reducible to mathematical precision. (Pet. App. 43a-45a). *See, Usery* v. *Tamiami Trail Tours, Inc.,* 531 F.2d 224, 238 (5th Cir. 1976); *Harriss* v. *Pan American World Airways,* 437 F.Supp. 413 (N.D. Calif. 1977), aff'd. .... F.2d ...., No. 78-1214 (9th Cir.

evaluation of alternative policies under the business necessity test. The court cited the *Furnco* language quoted by petitioners to illustrate that there are limits to judicial relief in the form of altering business practices. (Pet. 35; Pet. App. 51a). Nowhere in the opinion did the court hold that *Furnco* inhibited its examination of evidence of alternative policies, and the court in fact examined that evidence in considerable detail. *Supra* at 7-8.

Petitioners' contrary arguments are founded on the lower court's discussion of pretext, not business necessity. (See Pet. 30, quoting Pet. App. 53a-54a). The court observed that an allegation of discriminatory purpose could be rebutted by a showing that objective facts "reasonably" required adoption of a particular policy ". . . in order to achieve an overriding business purpose." (Pet. App. 54a).

Petitioners do not challenge this standard in the context of an analysis of pretext. They in fact agree that consideration of the reasonableness of a policy is appropriate where "motive is an essential element." (Pet. 30). Rather, their challenge to the standard is based on its transposition into the consideration of business necessity. This rearrangement was performed by petitioners, not by the court, and inaccurately portrays the grounds for the court's decision.

In sum, petitioners' argument that the court of appeals misapplied the burden of proof is discredited by the opinion itself. It presents no question for review.

III. Petitioners' third argument raises the novel contention that the lower court erred by failing to overturn findings of fact that it found unnecessary to its decision. (Pet. 36). Neither Rule 52 nor any other authority requires the courts of appeals to engage in such a pointless exercise.

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Dec. 23, 1980). The court did not find that a court's refusal to second-guess an employer's safety practices resolved the question of business necessity under Title VII; rather, the court went on to analyze Eastern's evidence under each of the *Lorillard* criteria.

Here the court found one factual finding of the trial court to be "clearly wrong." (Pet. App. 24a-25a). It explained in some detail the inadequacies of the evidence upon which the trial court relied. (Pet. App. 25a-26a, fn. 6). It accepted the trial court's other findings, differing only with respect to the legal conclusions to be derived from them:

> We do not otherwise disturb the district court's findings of subsidiary facts relating to the characteristics of pregnancy for it was in the traditional better position to consider conflicting expert evidence than are we. We differ, however, in the legal application of these and other facts to the business necessity defense.

(Pet. App. 25a).

Rule 52 does not apply to the district court's misapplication of the law. *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 394 (1947). Further, petitioners can hardly claim injury as the consequence of the court of appeals' failure to overturn findings of fact made in their favor at the trial court level.

Petitioners' additional contention, that the court of appeals violated Rule 52(a), Fed. R. Civ. P., by rejecting the trial court's findings as to the predictability of pregnancy-related disabilities (Pet. 36-38), is nothing other than a disagreement with the court of appeals' assessment of the sufficiency of the evidence. Rule 52 does not require a reviewing court to accept findings of fact unsupported by the evidence or to respect conclusions of law which do not properly rest on the facts so found. *Campana Corp.* v. *Harrison*, 114 F.2d 400, 405 (7th Cir. 1940).

In *Dayton Board of Education* v. *Brinkman*, 443 U.S. 526, 534-35 (1979), this Court found no basis for the petitioner's challenge to a ruling of the court of appeals similarly based on the insufficiency of the evidence. There the

issue was the existence of a dual school system. The district court's finding that no such system existed was overturned as clearly erroneous by the court of appeals, which found that the Board "...had responded with insufficient evidence to counter the inference..." that a dual system had been in operation. 443 U.S. at 534. In rejecting the petitioner's challenge to this holding, this Court held that under the clearly erroneous standard.

> . . . the role and duty of the Court of Appeals are clear: it must determine whether the trial court's findings are clearly erroneous, sustain them if they are not, but set them aside if they are. The Court of Appeals performed its unavoidable duty in this case and concluded that the District Court had erred. . . . We see no reason on the record before us to upset the judgment of the Court of Appeals in this respect.

443 U.S. at 534-35.

The *Brinkman* analysis is equally apt here. The court of appeals unquestionably followed the "clearly erroneous" standard of Rule 52. Petitioners' quarrel with its conclusion does not raise any question requiring review by this Court.

IV. There is no occasion for this Court to resolve contradictory decisions in the lower courts because there is no conflict among the circuits. The Ninth Circuit has recently affirmed a decision upholding a Pan American maternity policy which is similar to Eastern's. *Harriss* v. *Pan American World Airways, Inc.*, .... F.2d ...., No. 78-1214 (9th Cir. Dec. 23, 1980). The cases cited by petitioners as creating a conflict are decisions of district courts which have not been resolved by the appellate courts, are not final judgments, or were subsumed within the decision of the court of appeals below.[6]

[6] The decision in *In Re National Airlines*, 434 F.Supp. 249 (S.D. Fla. 1977), represents only the liability phase of a bifucated proceed-

Nor does petitioners' claim of "inconsistency" within the Fourth Circuit provide grounds for review. (Pet. 43). The propriety of a BFOQ defense where a mandatory leave policy was at issue was not addressed in *Condit* v. *United Airlines, Inc.*, 558 F.2d 1176 (4th Cir. 1977), *cert. den.* 435 U.S. 934 (1978).[7] The question was considered and resolved for the first time by the court of appeals *en banc* in the instant case. Most importantly, whether a BFOQ defense properly applies is not a question presented by the petition. Petitioners do not contend that the court erred in failing to apply the BFOQ test. Their assertion that decisions within the Fourth Circuit are inconsistent on a point not alleged to have been erroneously decided does not raise an issue requiring review.

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ing, the court reserving the damages question for another trial. 434 F.Supp. at 266. The case has not been reduced to final judgment susceptible to appeal. *McLennan* v. *American Airlines*, 440 F.Supp. 466 (E. D. Va. 1977), was originally joined with this appeal for *en banc* consideration but was settled prior to oral argument. *Airline Pilots Association* v. *Western Airlines, Inc.*, 22 EPD §30,636 (N.D. Calif. 1979) is on appeal in the Ninth Circuit.

[7] In *Condit*, a three-judge panel affirmed as not clearly erroneous the trial court's finding that United's mandatory maternity leave policy was lawful.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: December 31, 1980

**CERTIFICATE OF SERVICE**

I, Paul M. Thompson, Counsel for the Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served all parties required to be served by depositing three copies of the foregoing Brief in Opposition to Petition for a Writ of Certiorari in the United States Mail, first class postage prepaid, this 31st day of December, 1980, addressed to: Robert B. Wallace and Jay L. Westbrook, Surrey & Morse, 1156 15th Street, N.W., Washington, D.C. 20005; Lawyers' Committee for Civil Rights Under Law, 733 15th Street, N.W., Suite 520, Washington, D. C. 20005.

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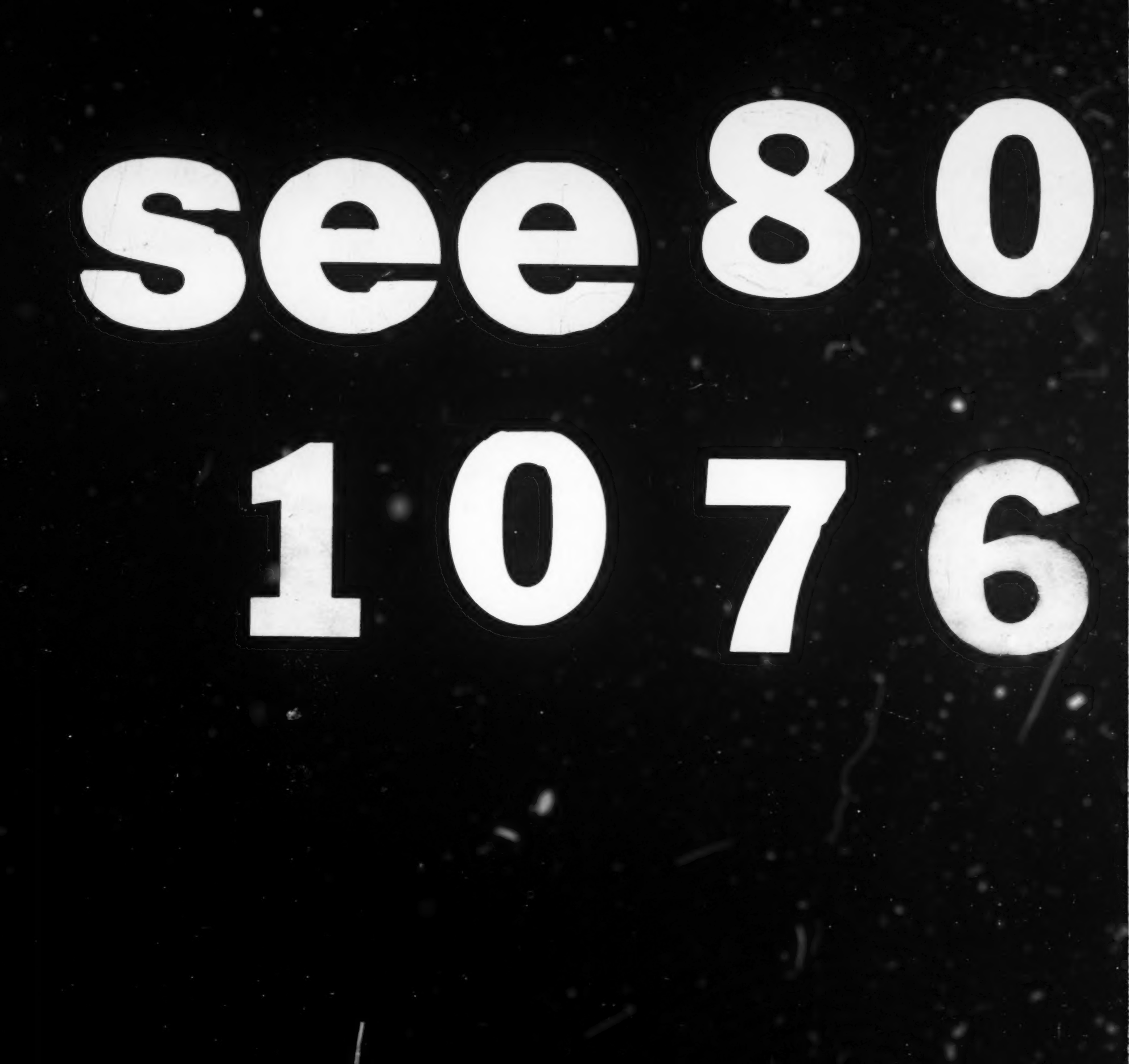
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